SUPREME COURT

No. 573

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Supreme Court of the United States

OCTOBER TERM, 1957

NEW YORK MAIL AND NEWSPAPER TRANSPORTATION COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

JOHN LORD O'BRIAN,
ROBERT L. RANDALL,
ALAIN FRIEDMAN,
701 Union Trust Bldg.,
Washington, D. C.

Attorneys for Petitioner.

Of Counsel:

WILLIAM L. BROAD,
MACKENZIE, SMITH, LEWIS,
MITCHELL & HUGHES,
Syracuse, New York.

COVINGTON & BURLING,
Washington, D. C.

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statement	2
Statutes Involved	5
Summary Statement	6
Reasons for Granting the Writ	8
The Court Below Improperly Failed to Apply the General Advertising Statute	8
I. Failure to Apply the "Sole Supplier" Exception of the General Advertising Statute Resulted in a Clearly Erroneous Construction of an Important Federal Statute	11
II. The Finding by the Court of Claims of No "Public Exigency" Conflicts Directly with Both a Decision of the Court and a Specific Finding of Congress	15
Conclusion	18
Appendix	20
Opinion of the Court Below	1A
Judgment of the Court Below	8A
Dissenting Opinion of Judge Littleton	8A
Dissenting Opinion of Judge Madden	45A

CITATIONS

Cases:

Good Roads Mach. Co. v. *United States*, 19 F. Supp. 652 (D. Mass. 1937) 16
Moran Bros. v. *United States*, 39 C. Cls. 486 (1904) 16
Pacific Steam Whaling Co. v. *United States*, 36 C. Cls. 105 (1901) 16
United States v. *Belridge Oil Co.*, 13 F.2d 562 (9th Cir. 1926) 16
United States v. *Speed*, 8 Wall. 77 ..... 7, 18
United States v. *Heller*, 1 F. Supp. 1 (D. Md. 1932) 16

Statutes:

	Page
Act of March 2, 1861 (12 Stat. 220)	16
Act of December 27, 1950 (64 Stat. 1118)	5
United States Code, ti. 39 § 421	9
United States Code, ti. 39 § 423	2
United States Code, ti. 41 § 5 (R. S. 3709)	1, 5, 7, 8, 10
United States Code Ann., ti. 16, § 17(b) (46 Stat. 382)	11
United States Code Ann., ti. 16, § 825(k) (49 Stat. 859)	10, 11
United States Code Ann., ti. 42, § 283(l) (58 Stat. 707)	10
United States Code Ann., ti. 42, § 1870(c) (64 Stat. 153)	10
United States Code Ann., ti. 48, § 1409(b) (58 Stat. 829)	10
United States Code Ann., ti. 50, § 198(d) (68 Stat. 675)	10

Miscellaneous:

2 Opinions of the Attorney General, 257	6, 15
17 Opinions of the Attorney General, 84	13
39 Opinions of the Attorney General, 111	15
1 Decisions of the Comptroller General, 748	13
16 Decisions of the Comptroller General, 1019	15
Sen. Rep. No. 597, 80th Cong., 1st Sess.	14
Sen. Rep. No. 2500, 81st Cong., 2d Sess.	9
House Rep. No. 3144, 81st Cong., 2d Sess.	3, 9, 12
House Rep. No. 109, 80th Cong., 1st Sess.	14
Hearings before Joint Committee on Defense Production, 83rd Cong., 2d Sess.	14
96 Congressional Record, 14665, 81st Cong., 2d Sess.	12, 17

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v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Claims entered on July 31, 1957 (Appendix, p. 8a).

OPINIONS BELOW

The majority and dissenting opinions in the Court of Claims (Appendix, pp. 1a, 8a and 45a) are as yet unreported.

JURISDICTION

The judgment of the Court of Claims was entered on July 31, 1957 (Appendix, p. 8a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This case presents important questions of statutory construction involving the statute (R. S. 3709) re-

quiring that Government contracts be awarded only after advertising for bids. The specific question presented is:

In view of the provisions of the general advertising statute that advertising is not to be required either when there is only one possible bidder or when a public exigency exists, may a court invalidate a contract for lack of prior advertising where there have been congressional and administrative findings that both such conditions exist.

STATEMENT

From 1932 to 1954, petitioner was the owner of the only pneumatic tube system which could be used for the transportation of mail in New York City. Since 1932, there had been a continuous series of contracts between petitioner and the United States for the use of this system to transport mail.

The Post Office Department was using petitioner's system in 1950 under a one-year contract running to December 31, 1950. On January 25, 1950, pursuant to the requirements of 39 U.S.C. § 423. which provided for a survey by postal authorities before advertising for contracts for pneumatic tube service, the Postmaster General appointed a commission of three to investigate the need for continuing the use of the pneumatic tube system beyond December 31, 1950. This commission reported on March 10, 1950 that the pneumatic tube service was a valuable transportation service and should be continued.[1]

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[1] Subsequently, the same commission submitted supplemental reports indicating that because of improved truck service, mail might be more economically transported by truck than by pneumatic tube.

On the basis of this report, the Post Office Department published, commencing April 24, 1950, an "Advertisement Inviting Proposals for Furnishing a Tube System on a Lease or Rental Basis for Use in the Transmission of Mails by Pneumatic Tubes or Other Similar Devices at New York, New York." Petitioner, owning the only such tube system in New York, was, of course, the only bidder. Petitioner, moreover, proposed terms which varied from the invitation and which the Postmaster General was without authority to grant. Specifically, petitioner sought a compensation of $15,500 a mile and a firm ten-year contract, while the so-called "pneumatic tube statute" then in force imposed a ceiling of $12,000 per mile and made such contracts subject to annual appropriation acts.[2]

The Postmaster General, believing petitioner's proposal to be reasonable and being anxious to accept it before the termination of the current contract, requested Congress to remove the two limitations. Congress promptly did so, in the Act of December 27, 1950, by raising the ceiling to $15,500 and by specifically authorizing such contracts "for terms not exceeding ten years."

The old contract was due to expire in four days. Furthermore, the Consolidated Edison Company of New York had demanded that a new commitment to it

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[2] Consolidated Edison, which was furnishing power for the operation of the pneumatic system, had notified the petitioner of its intention to change from the direct current to alternating current cycle. This would necessitate a very large expenditure by petitioner for new and different equipment. It was for the purpose of meeting this expenditure that petitioner asked for an increased rental and a ten-year contract, in order to help amortize the cost of the necessary new equipment. The Postmaster General was fully aware of all these facts. See H.R. Rep. No. 3144, 81st Cong. 2d Sess. (1950).

be made by petitioner on or before December 31. Regarding this situation as an emergency, the then Postmaster General (Donaldson) and petitioner executed the pneumatic tube contract here in question on December 29, 1950, two days after the enactment of the new tube statute. The contract, although containing many of the general provisions which had been advertised earlier on April 24, 1950, contained terms which had been negotiated by the parties and finally authorized by the Act of December 27, 1950.

The contract was performed by both parties from January 1, 1951 to December 29, 1953 when a new Postmaster General (Summerfield) notified petitioner that "in the public interest and for the general welfare" the United States considered the contract to be "null and void." Despite petitioner's protestations that this action constituted a breach of contract, the Postmaster General refused to rescind the order. Thereafter, the petitioner instituted this suit for damages for breach of contract.

A majority of the Court of Claims held that the Act of December 27, 1950, required that the contract be awarded pursuant to advertising. By this ruling the Court in effect nullified the exception contained in the General Advertising Statute exempting such contracts from the requirement of advertising in cases where only one source of supply is available. The Court therefore failed to consider or even to mention the "sole supplier" exception. The Court recognized the existence of the other exception exempting contracts from the requirement of advertising when the public exigencies require the immediate performance of services, but held that in this case there was no indication of the existence of such an exigency. Lastly, the Court held that since the terms of the contract differed sig-

nificantly from the advertising that had taken place, the contract was "void". The Court nevertheless awarded petitioner certain of its out-of-pocket expenses.

Judge Littleton and Judge Madden dissented, finding that the Act of December 27, 1950 simply incorporated the general advertising requirements of R. S. 3709 and that the contract here was within both the "public exigency" and "sole supplier" exceptions to those requirements.

STATUTES INVOLVED

R. S. 3709, as amended, 60 Stat. 809, 41 U.S.C. § 5, the general statute relating to the advertising of government contracts, provides in pertinent part as follows:

> "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed * * * (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, * * *."

The pneumatic tube contract statute in effect on the date the contract in suit was executed, the Act of December 27, 1950, 64 Stat. 1118, contained the following provisions with respect to advertisement:

> "* * * the Postmaster General may enter into contracts for terms not exceeding ten years, for

the transmission of mail by pneumatic tubes or other mechanical devices.

"Sec. 2. Contracts for the transmission of mail by pneumatic tubes or other mechanical devices shall be subject to the provisions of law relating to the letting of mail contracts, except as otherwise provided in this Act. Advertisements shall state in general terms only the requirements of the service and shall be in the form best calculated to invite competitive bidding. The Postmaster General may reject any and all bids. No contract shall be awarded except to the lowest responsible bidder tendering full and sufficient guaranties to the satisfaction of the Postmaster General of his ability to perform satisfactory service."

SUMMARY STATEMENT

From the passage of the earliest federal advertising statute in 1809 (2 Stat. 536; see 2 Ops. A. G. 257, 259 (1829)) to the enactment of comprehensive government procurement laws in recent years, Congress and the executive departments have fully understood that many, if not most, government contracts must be based on negotiation rather than advertising.

It is obvious that where there is only one possible bidder advertising would be a completely wasteful and senseless procedure. Further, if the meaning of the statutory phrase "advertise for bids" is to be given any weight, it must be conceded that this would be a wholly futile requirement where there is only one possible bidder. This is the reason for the existence in the General Advertising Statute of the "sole supplier" exception. The same is true of the other exception exempting from the requirement of advertising contracts when the public exigencies require the immediate delivery of the articles or performance of the

service. This petition concerns both of these exceptions. It is our contention that the Court below, by ignoring the "sole supplier" exception, in effect nullified it, and that the Court erroneously interpreted the other exception relating to public exigencies.

Both of these exceptions are contained in the General Federal Advertising Statute involved in this case (R.S. 3709, 41 U.S.C. § 5). The correct interpretation of these exceptions is of vital importance in a general sense far beyond their effect upon this case, because similar exceptions are also included in advertising requirements specifically regulating procurement by the Armed Forces, the General Services Administration, and other Federal agencies, and are invoked daily whenever applicable in the field of Government procurement. Nevertheless the Court below failed to consider or even to mention the statutory exception exempting this contract from the requirement of advertising because it was to be negotiated with a "sole supplier". It is clear, however, that the majority of the Court below did consider this General Advertising Statute as applicable to petitioner's contract because it went out of the way to note that:

> "The Postmaster General did not rely on a rule of necessity to maintain postal functions. Cf. 41 U.S.C. § 5. *There is no indication of exigency.* Trucks were used in 1953. *United States* v. *Speed,* 8 Wall. 77, 83." (Emphasis supplied)

This de novo judicial notation that there was a lack of public exigency in this case is not only in direct conflict with the cited decision, *United States* v. *Speed, supra,* but it makes sense only if the Court below recognized that the General Advertising Statute was here applicable to the pneumatic tube contract in question.

In other words, the majority of the Court held that the exemption relating to public exigencies did not do away with the requirement for advertising in this case because "trucks were used in 1953". Although, as discussed below, petitioner asserts that this ruling was erroneous, no explanation is apparent for the failure of the Court below to recognize that under the circumstances of this case this contract fell squarely within the "sole supplier" exception regardless of whether or not the "public exigencies" exception applied.

Failure to reverse this construction not only will leave a completely arbitrary decision as future precedent but it will also undermine the importance of the general advertising statute and its exceptions in other broad areas of government contract activity. This is especially true since the Court of Claims is the nation's forum for such problems, and that Court's interpretations are given considerable weight in the Federal District Courts when government contract litigation arises there.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW IMPROPERLY FAILED TO APPLY THE GENERAL ADVERTISING STATUTE

The decision below serves to nullify two of the important exceptions contained in the general advertising statute, R. S. 3709, 41 U.S.C. § 5.

It is clear that the majority of the Court below erroneously construed the general advertising statute. The attempt of the majority to avoid explicit discussion of the general statute by declaring that the pneumatic tube statute, under which petitioner's contract was executed, itself required advertising should be rejected. It is our contention that these two statutes, one general and the other special, must be read together.

The majority's decision that advertising was required rests on the statement in the December 27, 1950 tube statute subjecting petitioner's contract "to the provisions of laws relating to the letting of mail contracts." This portion of the statute was interpreted to bring the contract for pneumatic tube service within the advertising requirements of 39 U.S.C. § 421, a law compelling the Post Office Department to advertise before contracting for "general mail lettings."[3] But such a reading was clearly error. The contract for tube service, as the dissent forcefully indicates, did not involve a "general mail letting." Indeed, the majority itself recognized this at one point in its opinion. Thus, it distinguished between pneumatic tube service and general mail lettings in refusing to uphold the Postmaster General's second ground for invalidating petitioner's contract. This ground would have applied to the tube contract a power retained by the Postmaster General under department regulations to cancel any mail route in the public interest. Above all, Congress unmistakably intended petitioner's contract to be executed without formal advertising, for it was informed that the contract for tube service in New York City was to be entered into by negotiation and that competitive bidding would be employed only for tube service sought in other cities. Sen. Rep. No. 2500, 81st Cong., 2d Sess. (1950); H. R. Rep. No. 3144, 81st Cong., 2d Sess. (1950). Properly viewed, therefore, the pneumatic tube statute did not require advertising, with the consequence that petitioner's contract

[3] The majority opinion in fact referred to 39 U.S.C. § 429, which deals with the *award* of contracts to the lowest bidder. The intended reference must have been to 39 U.S.C. § 421 which deals with *advertising* required for "general mail lettings." This error was recognized and noted by the dissenting opinion. See App. p. 12a.

came within the provisions of the general advertising statute.

Even if R. S. 3709 on its face could be said to contemplate formal advertising, the basic problem presented by this petition—and running throughout the category of special procurement statutes—is that of integrating the special statute authorizing contracts of a specific subject matter with a broad statute prescribing the procedure to be followed generally. The general advertising statute together with its exceptions should control procurement statutes requiring advertising, as it unquestionably controls statutes silent on the question of advertising. Beyond its clear application to the latter statutes, the general statute blankets and reinforces specific statutes which do require advertising. Similarly, its exceptions should apply to contracts executed under the authority of those statutes, for these exceptions refer to situations in which contracts are entered into rather than their subject matter. Moreover, the introductory phrase of the general statute, making it applicable "unless otherwise provided by law," suggests that the statute is to affect specific procurement laws which by their own terms require advertising. This, apparently, has been the intent of Congress over many years, for the legislature has consistently excepted from the provisions of 41 U.S.C. § 5 specific government contract activities authorized by statute when it did not wish to require advertising.[4]

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[4] The following statutes explicitly permit Executive Departments to contract without advertising: 68 Stat. 675 (1954), 50 U.S.C.A. § 198(d) (Secretary of Commerce—repairs and reconditioning of vessels). 58 Stat. 707 (1944), 42 U.S.C.A. § 283(1) (National Cancer Institute—purchase of radium). 58 Stat. 829 (1944), 48 U.S.C.A. § 1409(b) (Secretary of Interior—acquisition of improved lands—Project Island of St. Croix). 64 Stat. 153 (1950), 42 U.S.C.A. § 1870(c) (National Science Foundation—contracts). 49

In these circumstances, therefore, this Court should hold the general advertising statute, with its exceptions from the requirement of advertising, applicable to specific procurement statutes which themselves demand advertising.[5]

I

Failure to apply the "sole supplier" exception of the general advertising statute resulted in a clearly erroneous construction of an important federal statute.

The Court below found that petitioner was the only company with "the facilities which would have enabled it to make a bid" on a contract for the rental by the government of an existing integrated pneumatic tube system to transport mail in New York City from January 1, 1951 through December 31, 1960. There was no disagreement that the fact had been certified by the Postmaster General. Nevertheless, a majority of the Court below refused to treat petitioner as a sole supplier and required the government to advertise where only one bid was possible, thereby ignoring the plain language of the general advertising statute.

On the factual level, there is no dispute. Petitioner owned the only pneumatic system useable by the Post

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Stat. 859 (1935), 16 U.S.C.A. § 825(k) (Federal Power Commission—contracts for engraving and lithographing). 46 Stat. 382 (1930), 16 U.S.C.A. § 17 (b) (Secretary of Interior—contracts for services and accommodations in national parks and monuments). 71 Stat. 285 (1957), (Architect of the Capitol—contracts and expenditures for additional office building for the United States Senate). 71 Stat. 153 (1957), (Veterans Canteen Service—contracts and agreements of canteen service for veterans, and hospitals, homes, purchases of equipment, supplies and services for veterans.

[5] The majority opinion itself seems to have recognized, although unclearly, that 41 U.S.C. § 5 applied to the tube contract *even if* the pneumatic tube statute required advertising. Thus, the majority felt obliged to reject the applicability of the general advertising statute's "public exigency" exception. See p. 7, *supra*.

Office Department in New York City. The sole supplier exception thus clearly applies to the pneumatic tube contract between petitioner and the government.[6]

The evidence is also indisputable that there had been a "certification" by the "contracting officer" that only one source of supply for this contract existed. The general advertising statute does not indicate the form certification is to take. Presumably, as is the case with contracts executed under the Armed Services Procurement Act, certification is by the executive department officer negotiating the contract to the head of the federal agency or his delegate. For the present contract, however, the Postmaster General himself was the "contracting officer." Since certification is required only in order to assure the agency head that the situation truly demands unadvertised contracting, requiring a more formal certification in the case of this pneumatic tube contract could be only a useless gesture. Were such certification required notwithstanding the circumstances, however, the record would again disclose that it indeed took place. A practical certification that plaintiff was a "sole supplier" must have occurred when the Postmaster General himself signed the contract. Also, the Postmaster General's appeal to Congress for enactment of the December 27, 1950 statute appears as nothing less than a certification in fact that the New York City tube situation fell within this exception to the advertising statute. It is impossible on the facts of the record to avoid the conclusion that certification of plaintiff's status was made.

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[6] Indeed, Congressional hearings and debates on the Act passed December 27, 1950, authorizing the tube contract referred specifically to petitioner as the party with which the tube contract would be executed; 96 Cong. Rec. 14665 (1950); H.R. Rep. No. 3144, 81st Cong., 2d Sess. (1950).

As set out in the general advertising statute, the "sole supplier" exception contains two prerequisites.[7] The supplies or services contracted for must be available from only one source of supply, and the contracting officer must so certify. With slight variations of language, this exception has been included in such statutes granting broad government contract authority as the Armed Services Procurement Act of 1948, 62 Stat. 21, 10 U.S.C. § 2304(a)(10), and the Federal Property and Administrative Services Act of 1949, 63 Stat. 393, whose procurement provisions governing advertising are found in 41 U.S.C. § 252(c). Although the legislative history of the general advertising statute is opaque, the legislative history of the "sole supplier" sections of these 1948 and 1949 statutes highlights the purpose for which the exception was enacted. It discloses, furthermore, that the contract for pneumatic tube service undoubtedly meets the qualifications described as important for execution of a government contract without advertising under authority of the exception. The committee reports on the "sole supplier" exception of the Armed Services Procurement Act are particularly illuminating. Perhaps the best statement of the importance and the operation of the exception is found in the report of the Senate Committee, which stated:

> "[T]his section is intended to place the maximum responsibility for decisions as to when it is impracticable to secure competition in the hands of the agency concerned. The experiences of the war and contracts negotiated since the war in the

[7] The "sole supplier" exception, officially written into the general advertising statute by a 1946 amendment (60 Stat. 809), had been recognized in practice since at least 1881. See 17 Op. Att. Gen. 84 (1881); 1 Dec. C.G. 748 (1922).

fields of stevedoring, ship repairs, chartering of vessels, where prices are set by law or regulation, or where there is a single source of supply, have shown clearly that the competitive-bid-advertising method is not only frequently impracticable but does not always operate to the best interest of the Government." Sen. Rep. No. 597, 80th Cong., 1st Sess. p. 8 (1947)[8]

This emphasis by the Congress on the importance of the "sole supplier" exception, as one aspect of government contracting by negotiation without advertising, was not misplaced. In the years since enactment of the Armed Services Procurement Act and the Federal Administrative and Property Services Act, the percentage and importance of government contracts executed through negotiation has been significantly greater than the percentage and importance of advertised contracts. Thus, of the contracts awarded by the three military services during fiscal 1953 when petitioner's contract was said to be void, only $3 billion were awarded by advertising while over $25 billion were negotiated.[9]

One conjectures in vain for a rationale to support the refusal of the Court of Claims to apply the "sole supplier" exception in dealing with the pneumatic tube contract. Both the record in this case and the legislative history of the relevant statutes reveal that

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[8] The House Committee declared:

"Where there is but one supplier the formal advertising method of buying is unworkable and is likely to necessitate the payment of excessive prices by the Government. * * * On the other hand, by negotiating directly with the single source, unreasonable charges and exorbitant profits may be eliminated, with a resultant saving to the Government." H.R. Rep. No. 109, 80th Cong., 1st Sess. pp. 8-9 (1947).

[9] Hearing before Joint Committee on Defense Production, 83rd Cong., 2d Sess. p. 71 (March 8, 1954).

the parties, as well as the Congress, understood from the outset that petitioner was the only possible person who could supply mail tube service in New York City. The Court of Claims majority itself acknowledged this fact. It stated:

> "It was unlikely that any other bidder would compete as there was no other tube system." (App. p. 6a)

Clearly, the brief attempt of the majority of the Court of Claims to reason that the exceptions to the general advertising statute "should be and are limited" can not be accepted as an explanation for the Court's refusal to apply the exception. Failure to employ the exception to uphold the government contract in this case could permit later invalidation of the many similar contracts also negotiated without advertising. The doctrine of the majority below, which abrogated the "sole supplier" exception, can be applied in the future by the government not only to large numbers of defense and other procurement contracts, but it may also put into question the validity of many existing contracts executed through negotiation.

II

THE FINDING BY THE COURT OF CLAIMS OF NO "PUBLIC EXIGENCY" CONFLICTS DIRECTLY WITH BOTH A DECISION OF THIS COURT AND A SPECIFIC FINDING OF CONGRESS.

The finding by the majority below of "no indication of exigency" conflicts with this Court's decision in the case of *United States* v. *Speed*, 8 Wall 77, 83. There this Court refused to substitute its judgment on whether a "public exigency" existed for that of an officer of the executive department.[10]

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[10] The "public exigency" exception was first acknowledged over 125 years ago as a ground for upholding unadvertised government contracts. 2 Op. Att. Gen. 257 (1829). See 39 *id.* 111 (1937); 16 Dec. C.G. 1019 (1937).

The officer whose duty it was to secure supplies for the Army, had contracted without advertising for the slaughter of cattle. The Court allowed plaintiff, the contractor, to recover on the contract. Interpreting the "public exigency" exception in a statute (Act of March 2, 1861, 12 Stat. 220) which was the forerunner of the present general advertising statute involved here, 41 U.S.C. § 5, the Court stated:

> "But that statute, while requiring such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance.
>
> "It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise." 75 U.S. at 83)[11]

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[11] This refusal in *Speed* to make "the validity of the contract . . . depend on the degree of wisdom or skill which may have accompanied its exercise" has properly influenced lower federal courts to exercise restraint in reviewing executive department decisions that public exigencies existed permitting execution of contracts without advertising. Where it has appeared reasonably probable that a public exigency did exist when the contract was entered into, the unadvertised contract has been upheld. See, *e.g.*, *United States* v. *Belridge Oil Co.*, 13 F. 2d 562 (9th Cir. 1926), *cert. denied*, 273 U.S. 733; *Good Roads Mach. Co.* v. *United States*, 19 F. Supp. 652, 654 (D. Mass. 1937); *United States* v. *Heller*, 1 F. Supp. 1, 3 (D. Md. 1932); *Moran Bros.* v. *United States*, 39 C. Cls. 486, 493 (1904). Moreover, the very nature of the statute authorizing the expenditure disputed in a given case may disclose a public exigency and thus remove the contract from the advertising requirement. See *Pac. Steam Whaling Co.* v. *United States*, 36 C. Cls. 105, 108 (1901) (statute that authorized contract appropriated funds for relief of suffering Alaska population).

The facts of this record compel the conclusion that a "public exigency" involving mail service in New York City was thought to exist on December 29, 1950, by virtue of the threatened cessation of pneumatic tube service. The Postmaster General had informed Congress on August 26, 1950 that there would be a wholesale disruption of mail service in New York City if petitioner's existing contract were allowed to expire on December 31, 1950 without negotiation of a new contract. Moreover, as above stated, the Consolidated Edison Company of New York, which supplied electric power for the pneumatic tubes, had demanded a firm commitment from petitioner by December 31, 1950 that the machinery operating the tube system would be altered to receive alternating current power. Obviously, petitioner was in no position to give such a commitment without a contract. These facts were the basis of legislation on December 27, 1950, authorizing the contract between the petitioner and the Post Office Department.

In enacting the requested legislation, Congress made a record which speaks of the urgency of the situation. When, on September 13, 1950, the bill was brought up on the floor of the Senate for a vote, Senator Humphrey spoke of "the urgency of the request," and stated that unless the bill was passed, the entire transmission of mail by pneumatic tube in the Manhattan district and the general New York area would be interrupted and severely damaged.[12]

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[12] 96 Cong. Rec., p. 14665.

In these circumstances, the Postmaster General and the Congress must have considered that "public exigencies" required execution of the new contract without delay. At all events, in light of the *Speed* case, a judicial redetermination based on hindsight years later should not be substituted for a reasonable belief, when the contract was executed and legislation passed, that a "public exigency" existed. Because such an unwarranted redetermination was made by the Court below, this Court should, on the authority of the *Speed* case, reverse the decision of the Court of Claims voiding the pneumatic tube contract.

CONCLUSION

It is not open to argument that petitioner falls squarely within the "sole supplier" and "public exigency" exceptions to the general advertising statute. The Court of Claims misconstrued this important federal statute when it refused to find that negotiation of the contract without advertising was authorized by these exceptions. Such a construction by the Court of Claims, the principal forum for the determination of government contract rights, requires immediate review by this Court in order to remove an unwarranted cloud upon past and future government contracting.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN LORD O'BRIAN,
ROBERT L. RANDALL,
ALVIN FRIEDMAN,
701 Union Trust Bldg.,
Washington, D. C.

Attorneys for Petitioner.

Of Counsel:

WILLIAM L. BROAD,
MACKENZIE, SMITH, LEWIS,
MITCHELL & HUGHES,
Syracuse, New York.

COVINGTON & BURLING,
Washington, D. C.

October 1957

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 162-54

(Decided July 31, 1957)

NEW YORK MAIL AND NEWSPAPER TRANSPORTATION COMPANY

v.

THE UNITED STATES

REED, *Justice*, sitting by designation, delivered the opinion of the court:

The plaintiff, New York Mail and Newspaper Transportation Company, brought this suit in this Court on April 15, 1954, against the United States to recover damages for an alleged breach by the Government of a contract between the United States and plaintiff. Various items, some variable, enter into the total damages claimed aggregating around two million dollars. That contract was for the rental by the Government of pneumatic tubes on Route 507011-A, New York, New York, for the transmission of the mails from January 1, 1951, through December 31, 1960.

On December 29, 1953, defendant, having closed down this Pneumatic Tube Service during that December with notice thereof to plaintiff, advised plaintiff that it considered the contract "null and void." The notice added, "The purported contract if valid is hereby cancelled in the public interest." Plaintiff, on January 23, 1954, notified defendant that the contract was terminated for breach by the Government. The plaintiff had allowed until January 22, 1954, for defendant to consider plaintiff's position that the defendant had no legal right to terminate the contract. In the letter plaintiff explained that on termination of the contract, its employees would be scattered and its property values impaired. Defendant has not used the property since December 1953.

The contract dated December 29, 1950, continued arrangements between the United States and the owners of the pneumatic tube service that had existed, with some inter-

missions since about 1897. The provisions of law underlying the various contracts and their terms varied substantially.[1] The contract before the one here in question ran from January 1 to December 31, 1950. Like those immediately preceding it, this contract was on a lease or rental basis with the Government operating the tube system and the lessor bearing the cost of repair and maintenance.

In preparation for handling New York mail after 1950, the Post Office Department on April 24, 1950, advertised for proposals for furnishing a pneumatic tube system generally on the same rental basis as the existing contract. The pertinent provisions of the governing statutes at that time required for pneumatic tube contracts a preliminary investigation and a favorable report on the practicalities of such service. "Advertisements shall state in general terms only the requirements of the service" calculated to invite competitive bidding. They were to run for six weeks in not less than five newspapers. The contracts were to be subject to the postal laws and regulations relating to the letting of mail contracts. 39 U. S. C. (1946 ed.) § 423. See finding 4.

Furthermore, 39 U. S. C. § 429 directed:

> All contracts for carrying the mail shall be in the name of the United States and shall be awarded to the lowest responsible bidder tendering sufficient guaranties for faithful performance in accordance with the terms of the advertisement.

There is no contention that these requirements were not followed in the April 1950 advertisement for bids. However, plaintiff in its proposals to the United States in answer to the advertisement did not make its offer to contract in accordance with the terms of the advertisement. Instead, it submitted a proposal which specifically stated, "Conditions and requirements in your advertisement not specifically included in our proposal are intended to be excluded from our proposal." Finding 13.

Without detailing *in extenso* the variations between the invitation to bid and plaintiff's proposal and eventual contract, which appear in findings 12 to 23, inclusive, the conclusion is necessary that the variations were material. There was omitted the advertised requirement that the con-

[1] See 32 Stat. 114; 34 Stat. 1211; 35 Stat. 412; 42 Stat. 661; 62 Stat. 1163; 64 Stat. 1118.

tract was to be subject to cancellation for failure of plaintiff to change the location of the system by reason of changes by the Government in the tube terminals, findings 12 and 14; that the Postmaster General might terminate the contract when the public interest might require, finding 12; and that the contractor should bear the expense of converting the system from DC to AC electricity, at a cost estimated between $125,000 and $350,000. Contract, variable costs ¶ 2, Schedule A of contract, and finding 12. The cost turned out to be $214,870.13. Finding 32. Plaintiff's proposal and contract required the assumption of this cost with interest by the Government through amortization. Instead of a rate per annum for rent, as called for by the advertisement for bids, the contract makes the rental vary from year to year, depending upon operating and general expenses, e. g., operating taxes, wages, amortization of electrical conversion cost. There was a limit to bring total compensation within the statutory authority of the Department on cost. This method of payment appears to assure plaintiff a guaranteed net rental for the system, limited by the overall power of the Department to contract for pneumatic tube service. See Act of 1950, 64 Stat. 1118.

The Government's defense, in accordance with its notice, is two-fold—(1) that the contract is void because of its material departure from the terms of the advertised invitation to bid, and (2) that the cancellation "in the public interest" of the contract on December 29, 1953, by the Postmaster General was a valid exercise of a retained power under § 97.67 (b) of the Postal Laws and Regulations, Edition of 1948. As the second defense depends on a regulation that by its terms not only authorizes termination of a contract but settles all problems of damages, it should be considered first.

1. The section, at all times during the advertisement, negotiation and termination of this contract, read as follows:

> (b) The Postmaster General may discontinue or curtail the service on any mail route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause. The contractor shall be allowed, as full indemnity, one month's extra pay, on the amount of service dispensed

with and a pro rata compensation for the amount of service retained and continued.[2]

The Government contends the section was made applicable to Service by Pneumatic Tubes by § 95.2. "The general provisions relating to contract service, Part 97 of this chapter, shall apply, so far as pertinent, to the pneumatic-tube service." As reports to the Postmaster General before his discontinuance of the route showed by unchallenged evidence that an annual savings in postal operations of over $700,000 would be made by substituting trucks for the tube system, there was a substantial factual basis for the cancellation, if there was power in the Postmaster General to cancel. Power is the nub of this issue. The regulation, if applicable to this contract, could not, of course, validly be waived by the Postmaster General in this particular instance.[3] Actually the contract right to cancel in the public interest called for by the advertisement was omitted from the contract. We do not speculate on the reason, for the contract was finally made pursuant to the authority of the Act of 1950. The section here applicable reads:

> Sec. 12. Contracts for the transmission of mail by pneumatic tubes or other mechanical devices shall be subject to the provisions of laws relating to the letting of mail contracts, except as otherwise provided in this Act. Advertisements shall state in general terms only the requirements of the service and shall be in the form best calculated to invite competitive bidding. The Postmaster General may reject any and all bids. No contract shall be awarded except to the lowest responsible bidder tendering full and sufficient guaranties to the satisfaction of the Postmaster General of his ability to perform satisfactory service. 64 Stat. 1118.

Section 97.67 (b) does not appertain to a "letting of mail contracts" but to their "discontinuance." Although the

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[2] The present regulations seemingly do not provide this authority to discontinue contract routes. See 39 CFR (1955 Rev. Ed.) 97. It appears to have been eliminated November 20, 1954, 19 Fed. Reg. 6772, 6996.

[3] See *Chapman* v. *Sheridan-Wyoming Co.*, 338 U. S. 621, 629.

phrase "letting of mail contracts" has appeared in the statutes relating to pneumatic tube operation since 1902 (32 Stat. 114), we do not think that the regulation, § 97.67 (b), should be read as authorizing the cancellation attempted in the notice of December 29, 1953. It is a harsh regulation when applied to a long term contract, requiring such a heavy investment by the other contracting party, largely useless for other activities. We recognize that the power retained by the Postmaster General to cancel a star route contract has been enforced by the Supreme Court in *Garfielde* v. *United States*, 93 U. S. 242. There the contractor's proposals followed the advertisement and "instructions attached," which contained a regulation authorizing discontinuance in the public interest. See also *Slavens* v. *United States*, 196 U. S. 229, 232, upholding the power to cancel a mail contract containing a clause providing for such a discontinuance as was attempted in the present case. The contract now under consideration did not contain such a clause. We would need more specific words than the uncertainty of § 95.2, *supra*, that the "general provisions, relating to contract service, Part 97 * * * shall apply, so far as pertinent," to the tubes, to hold that § 97.67 (b) controlled this contract. The cancellation related to "public interests," not "contract service." It does not govern this situation. Nor would it govern if no contract had been validly adopted.

2. We now consider the first defense—the nullity of the contract because of the material departure of the contract from the advertised invitation. We think that the variations, previously listed herein, between the invitation, plaintiff's proposals, and the contract actually signed, demonstrate that the April advertisement could not be treated as a compliance with the essential provisions of 39 U. S. C. (1946 ed.) §§ 423 and 429, set out on p. 2, *supra*. Those sections remained the governing law as to advertising of postal requirements. Neither the Act of 1948, 62 Stat. 1163,[4] nor of 1950, 64 Stat. 1118, made any change. After the 1950 Act the statutory requirements for advertisements

[4] It merely amended the Acts of 1902, 1908, and 1922 by increasing the limitation on payments per mile. S. Rep. No. 1241, 80th Cong., 2d Sess.; H. R. Rep. No. 2093 and No. 2431, 80th Cong., 2d Sess.

were the same as before its passage. The 1950 Act, § 2,[5] as theretofore, made the newly authorized contract "subject to the provisions of laws relating to the letting of mail contracts."

The authority of an officer to enter into a contract binding the United States must be found in some legally enacted provision of law. That rule has been long recognized. *The Floyd Acceptances*, 7 Wall. 666; see *Hooe* v. *United States*, 218 U. S. 322, 334; *Eastern Extension Tel. Co.* v. *United States*, 251 U. S. 355, 363; *United States* v. *Goltra*, 312 U. S. 203, 208; *Fries* v. *United States*, 170 F. 2d 726, 730. When the statutes on contracts for the carriage of the mails call for prior advertisement, the execution of a contract without such advertisement is invalid. Cf. *United States* v. *Ellicott*, 223 U. S. 524, 543.[6]

If this contract had been drawn in accordance with the April 1950 advertised requirements for proposals, it may be that a second advertisement under the December 1950 Act would be unnecessary even though it called for compliance with the laws relating to letting mail contracts obviously including those imposing advertisement. 64 Stat. 1118. It was unlikely that any other bidder would compete, as there was no other tube system. A second advertisement was thought by the Attorney General to be unnecessary in a case where former bids, after advertisement, met the requirements of the advertisement.[7] Here there was no attempt to meet the terms of the advertisement. The con-

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[5] "Sec. 2. Contracts for the transmission of mail by pneumatic tubes or other mechanical devices shall be subject to the provisions of laws relating to the letting of mail contracts, except as otherwise provided in this Act."

[6] This was a case where the offer of the contractor set at naught the provisions of the specifications. If that were allowed, the Court said the contract would be "so irresponsive to and destructive of the advertised proposals as to nullify them, and therefore cause it to result that the contract was one made without competitive bidding which was necessary to give it validity."

[7] "The conclusion that, as matter of law, the bids thus obtained must be rejected and the whole thing done over again, merely because, at the time the bids were received, there was no specific provision of law authorizing the making of the contract contemplated, is not required or justified by any statute or by any fundamental principle of law." 36 Op. Atty. Gen. 33, 38.

tractor secured material modifications by negotiation. The Postmaster General did not rely on a rule of necessity to maintain postal functions. Cf. 41 U. S. C. § 5. There is no indication of exigency. Trucks were used in 1953. *United States* v. *Speed*, 8 Wall. 77, 83. Nothing appears to indicate the use of the system could not have been extended for the time necessary to advertise. The history of the 1950 Act does not show any direction by or intention of Congress to have this contract executed by the Postmaster General, without complying with previous provisions for advertisement. In fact his request for legislation and the Act really changed nothing except the limit on rent per mile.[8]

It need hardly be said that the general requirements of advertising for government contracts is a true rule of necessity to avoid the dangers of overpricing goods or services, with the accompanying dangers of corruption in a governmental organization. Variations from that requirement should be and are limited. Cf. 10 U. S. C. § 2304; see Report on Study of Armed Services Procurement Act, June 15, 1957. Here, although there was and is no suggestion of improper influence or unfair dealing, we conclude that the failure to meet by this contract the advertisement for proposals or to advertise again under the new Act makes the contract of 1950 invalid.

3. The next problem is what effect such invalidity has upon the services rendered by plaintiff and the expenses incurred by it on account of its undertaking. When the United States contracts, its rights and liabilities are the same as those of an individual, except it cannot be sued without its consent.[9] When an individual or the Government rescinds a contract, the parties are to be placed, as far as possible, in the position they would have occupied without the transaction.[10] So, in *United States* v. *Bethlehem Steel*

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[8] 64 Stat. 1118; S. Rep. No. 2500, 81st Cong., 2d Sess.; H. R. Rep. No. 3144, 81st Cong., 2d Sess.

[9] *Perry* v. *United States*, 294 U. S. 330, 352; *The Floyd Acceptances*, 7 Wall. 666, 675; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369; *United States* v. *Standard Rice Co.*, 323 U. S. 106.

[10] *Neblett* v. *McFarland*, 92 U. S. 101, 103. Cf. *Pan American Co.* v. *United States*, 273 U. S. 456, 505. But see *Schneider* v. *United States*, 19 C. Cls. 547, 551.

Co., 258 U. S. 321, a contract implied in fact rather than a tortious use of a patent was found. In *Clark* v. *United States*, 95 U. S. 539, 542, the Supreme Court said this of an invalid parol contract:

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

Here, as there was *bona fide* purpose to render services to the United States, as agreed to by the Postmaster General, we think the parties should be put substantially in the position they would have occupied without the attempted contract rather than a strict *quantum meruit*.

4. Our application of that conclusion leads to this.

Plaintiff has been paid under the contract for services performed through December 31, 1953, except for December expenses. These payments it should retain. Plaintiff should recover its December expenses of $27,960.94, its January 1954 expenses of $6,241.69, its special franchise taxes for the second half of the 1953-54 tax year, $12,792.18. In our opinion, since the cost of electric power conversion was due solely to the requirements of the contract, the Government should reimburse that expense in accordance with the terms of the contract, i. e., $141,564.47. Plaintiff should also recover for the same reason the cost of the new set of carriers purchased for use on the system, $27,551.52. As the removal of equipment from Government-owned stations would have been necessary whether or not the contract had been made, that claim is denied.

The counter-claims of the United States are dismissed.

It is so ordered.

LARAMORE, *Judge*, and WHITAKER, *Judge*, concur.

LITTLETON, *Judge*, dissenting:

I agree with the opinion of the majority that section 97.67 (b) of the postal laws and regulations did not give the Postmaster General the right to cancel the contract in suit. I disagree with the holding of the majority that the contract between the Postmaster General and the plaintiff

was invalid for lack of authority because the terms contained therein were not advertised to invite competitive bidding.

The sense of the majority opinion, as I understand it, seems to me to be this: (1) the Postmaster General was required to advertise the terms of the contract in suit for the transmission of mail in New York City by pneumatic tube or other mechanical device by reason of (a) 39 U. S. C. § 429, (b) by the pneumatic-tube statute in effect at the time of the purported advertisement in April 1950 (39 U. S. C. § 423), (c) by the pneumatic-tube statute enacted on December 27, 1950 (64 Stat. 1118), and (d) by R. S. 3709, the general statute covering the necessity for advertising government contracts; (2) because the terms contained in the December 29, 1950 contract with plaintiff differed materially from the terms advertised on April 24, 1950, it follows that the contract with plaintiff was never advertised by the Postmaster General; (3) because the December 1950 contract with plaintiff was not advertised, it is invalid as having been entered into by the Postmaster General without authority and contrary to the above four laws; and (4) although the contract is invalid because unauthorized and contrary to law, plaintiff may recover the value of its services because the record in the case establishes a bona fide purpose on the part of plaintiff to render service to the United States and on the part of the United States to receive and pay for such service.

I am of the opinion that (1) under the facts and circumstances of this case, the four statutes cited by the majority did *not* require the Postmaster General to advertise the contract in suit; (2) that the contract in suit was fully authorized and valid, and (3) that the plaintiff is entitled to recover all sums due plaintiff under the terms of the contract at the time of its cancellation and also a sum representing the difference between the contract price and the operating expenses which plaintiff did not have to meet by reason of the fact that it did not have to render performance for the remaining seven years of the 10-year contract term.

Were I to agree with the holding of the majority that the December 29, 1950 contract was invalid for lack of authority in the Postmaster General, I would be unable to agree with the conclusion reached by the majority that plaintiff is entitled to any recovery at all. I have always understood the general rule to be that lack of contracting authority in a

Government agent renders unenforceable against the Government a contract made by such agent, whether that contract is express or implied in fact. *Hooe* v. *United States*, 218 U. S. 322; *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330; *Sutton* v. *United States*, 256 U. S. 575; *Baltimore & Ohio R. R.* v. *United States*, 261 U. S. 385. However, the courts have been reluctant to hold that a Government agent lacks authority to perform an act or to enter into a contract, in the absence of a clear statutory prohibition or limitation. See *International Paper Co.* v. *United States*, 282 U. S. 399; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 330; *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls., 34; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682; *Whike Construction Co.* v. *United States*, 135 C. Cls. 126. I see no justification in the facts of the instant case or in the applicable law for finding or implying any lack of authority in the Postmaster General to negotiate for the contract in suit.

Four provisions of law are cited by the majority as requiring the Postmaster General to advertise the contract in suit. For the purposes of discussion I shall set forth below the pertinent provisions of the four statutes. For reasons which I shall discuss in some detail hereinafter, I am of the opinion that 39 U. S. C. 429 is not a provision of law requiring advertising, and that under the facts and circumstances of this case, none of the other three statutes set forth below required that this particular contract with plaintiff be advertised.

(1) 39 U. S. C. 429 provides for the *awarding* of mail contracts, which have been advertised, to the lowest responsible bidder, as follows:

> All contracts for carrying the mail shall be in the name of the United States *and shall be awarded* to the lowest responsible bidder tendering sufficient guaranties for faithful performance in accordance with the terms of the advertisement. Such contracts shall require due celerity, certainty, and security in the performance of the service; but the Postmaster General shall not be bound to consider the bid of any person who has willfully or negligently failed to perform a former contract. [Italics supplied.]

(2) The statute authorizing the Postmaster General to enter into contracts for the transmission of mail by pneumatic tubes or other mechanical devices, 39 U. S. C. 423, as that law stood prior to the December 27, 1950 amendment, provided as follows:

> The Postmaster General may enter into contracts * * * for the transmission of mail by pneumatic tubes or other similar devices for a period not exceeding ten years, *after public advertisement once a week for a period of six consecutive weeks in not less than five newspapers, one of which shall be published in each city where the service is to be performed.* Contracts for this service shall be subject to the provisions of the postal laws and regulations relating to the letting of mail contracts, *except as herein otherwise provided, and no advertisement shall issue until after a careful investigation shall have been made as to the needs and practicability of such service and until a favorable report, in writing, shall have been submitted to the Postmaster General by a commission of not less than three expert postal officials, to be named by him; nor shall such advertisement issue until in the judgment of the Postmaster General the needs of the Postal Service are such as to justify the expenditure involved. Advertisements shall state in general terms only the requirements of the service and in form best calculated to invite competitive bidding.*
>
> The Postmaster General shall have the right to reject any and all bids; *no contract shall be awarded except to the lowest responsible bidder tendering full and sufficient guaranties, to the satisfaction of the Postmaster General, of his ability to perform satisfactory service,* and such guaranties shall include an approval bond in double the amount of the bid. [Italics supplied.]

(3) The pneumatic-tube contract statute which was in effect on the date the contract in suit was executed was the Act of December 27, 1950, 64 Stat. 1118, and it contained the following provisions with respect to advertisement:

> * * * the Postmaster General may enter into contracts for terms not exceeding ten years, for the transmission of mail by pneumatic tubes or other mechanical devices.

> SEC. 2. Contracts for the transmission of mail by pneumatic tubes or other mechanical devices shall be subject to the provisions of laws relating to the letting of mail contracts, except as otherwise provided in this Act. *Advertisements shall state in general terms only the requirements of the service and shall be in the form best calculated to invite competitive bidding.* The Postmaster General may reject any and all bids. *No contract shall be awarded except to the lowest responsible bidder tendering full and sufficient guaranties to the satisfaction of the Postmaster General of his ability to perform satisfactory service.* [Italics supplied.]

(4) R. S. 3709, as amended, 60 Stat. 809, 41 U. S. C. § 5, (1946 Ed.), which is the general statute relative to the advertising of Government contracts, provides in pertinent part as follows:

> *Unless otherwise provided* in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed * * * (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, * * *. [Italics supplied.]

With reference to the first statute set forth above (39 U. S. C. 429), I note that the majority characterizes that law as one of the "governing law[s] as to advertising of postal requirements." I am of the opinion that the provision in question does not require the *advertising* of postal contracts, but rather requires the Postmaster General to *award general mail letting contracts, which some other provision of the postal laws requires to be advertised,* to the lowest responsible bidder who tenders sufficient guaranties for faithful performance of the service desired, in accordance with the terms of the required advertisement. The postal law requirement for the *advertising of general mail lettings* is found in 39 U. S. C. 421, and I think that 39 U. S. C. 429 has reference only to the *award* of general mail

lettings which were required to be advertised, and had been advertised, under section 421 of the postal laws.

The contract with this plaintiff did not involve a general mail letting, and I do not think that 39 U. S. C. 421 or 429 have any bearing on the issues of (1) whether the Postmaster General was required to *advertise*, or (2) whether the Postmaster General had authority to *award* the contract in suit without prior advertising. I think that we should look first to the specific statute under which the Postmaster General purported to act when he contracted with this plaintiff on December 29, 1950, and from that statute determine the extent of, and the limitations on, his authority to contract at that time for the transmission of mail in New York City by pneumatic tube.

At the time the contract in suit was advertised in April 1950, the pneumatic-tube statute then in effect did not require the Postmaster General to *award* the contract to the lowest responsible bidder tendering guaranties of faithful performance "in accordance with the terms of the advertisement." On the contrary, the pneumatic-tube statute merely stated that the Postmaster General should not award a contract to any but the lowest responsible bidder tendering full and sufficient guaranties "*to the satisfaction of the Postmaster General of his ability to perform satisfactory service*". Nothing in that pneumatic-tube statute limited the Postmaster General's contracting authority to a bidder who guaranteed performance *in accordance with the terms of an advertisement.*

But the majority suggests that because the pneumatic-tube statute in effect at the time of the advertisement in April 1950, and prior to the date of execution of the contract, provided that the Postmaster General might enter into contracts for the transmission of mail by pneumatic tube "after public advertisement," a contract executed by the Postmaster General which contained terms that had not been publicly advertised was not the sort of contract permitted by the statute, and was beyond the authority of the Postmaster General under that statute. Although I agree wih Judge Madden that the pneumatic-tube law in effect prior to December 27, 1950, has no real bearing on the issues of this case, I am of the opinion that if the prior law has any effect it did not require the Postmaster General to issue a new advertisement covering the terms negotiated by the parties, which terms were different from those

contained in the April 1950 advertisement. The prior pneumatic-tube law which was in existence at the time of the April advertisement, provided that the advertisement state *in general terms only* the requirements of the service for which the Postmaster General desired to contract. The issuance of the advertisement published by the Postmaster General in April 1950 complied in every respect with each provision of the pneumatic-tube law then in effect except that the terms of that advertisement were not general but, on the contrary, were extremely detailed. In my opinion, when a law requires advertisement in general terms only, it is the intention of the lawmakers to leave the detailed provisions of the contract open to negotiation by the authorized representative of the Government, particularly where that law does *not* require that the contract be awarded to the lowest bidder guaranteeing performance in accordance with the terms of the advertisement. That such was the intention of Congress in enacting the pneumatic-tube statute is demonstrated by the fact that in that statute the Postmaster General was not required to award a contract to the bidder who guaranteed performance in accordance with the terms of the advertisement as he would have been required to do in the case of a general mail letting contract under sections 421 and 429 of the postal laws. Accordingly, I am of the opinion that if the contract which was executed in December 1950 had contained general terms which were responsive to the general terms advertised, and detailed terms which had been negotiated between the parties, and all the terms had been within the limits of the pneumatic-tube statute then applicable, the contract would have been fully authorized and valid.

What actually happened in this case is that the parties could not execute a contract containing certain detailed provisions desired by both parties because provisions in the existing pneumatic-tube statute did not permit the Postmaster General to agree to such terms. In general, the terms which the parties wished to incorporate in the contract and which were contrary to the existing pneumatic-tube law, had to do with the amount of compensation the Postmaster General might commit the Government to pay for the service desired. Existing pneumatic-tube law contained a ceiling of $12,000 on the rate per mile payable in New York City, and the law also provided that contracts

for pneumatic-tube service were subject to annual appropriation acts for the Post Office Department. Both of these limitations had to be removed by Congress before the contract which plaintiff and the Postmaster General had agreed upon could be executed. Accordingly, the Postmaster General asked Congress to enact new pneumatic-tube legislation raising the compensation rate per mile ceiling in New York City for 10 years from $12,000 to $15,500, and eliminating the provision in existing law that contracts for pneumatic-tube service in New York City be subject to annual appropriations for the Post Office Department. The Postmaster General was willing that the $15,500 ceiling applicable to New York should revert to the $12,000 ceiling at the expiration of the 10-year contract which he had negotiated with plaintiff. In the law which was enacted on December 27, 1950, Congress did both of these things.

Following the passage of the December 27, 1950 pneumatic-tube statute, the Postmaster General and plaintiff executed the 10-year contract in suit. That contract contained many of the general provisions which had been advertised on April 24, 1950. It also contained terms as to payment and certain detailed terms regarding cancellation which had not been advertised on April 24, 1950, but which terms had been negotiated by the parties during the months following the April 24, 1950 advertisement. Although none of the terms of the December 29, 1950 contract were in conflict with the law which was in existence on that date, the majority holds that the contract executed by plaintiff and the Postmaster General *pursuant to that law* was unauthorized and invalid because of the failure of the Postmaster General to issue a new advertisement containing terms which had not been previously advertised but which had been arrived at through negotiation.

The majority opinion states categorically that the December 27, 1950 pneumatic-tube statute did nothing to change the advertising requirements which had been expressed in the prior pneumatic-tube statute, and, that if advertising was required under that prior law, it was equally required by the terms of the new statute enacted just before the contract in suit was executed. In my opinion, the December 27, 1950 pneumatic-tube statute *made very material changes in the advertising requirements which had been contained in the prior law.* The first, and perhaps the most important difference in the two pneumatic-tube statutes relative to ad-

vertising, is shown by the fact that the earlier law authorized the Postmaster General to enter into pneumatic-tube contracts "*after public advertisement.*" *The December 27, 1950 statute contained no such provision.* The other changes in the advertising provisions of the earlier law follow logically from the omission in the 1950 statute of the requirement that contracts be entered into after public advertisement. The pneumatic-tube statute in effect prior to December 27, 1950 required (1) that before an advertisement could be made, the Postmaster General must secure a favorable report on the necessity for pneumatic-tube service from a commission of three postal experts; (2) that following such favorable report, the service must be advertised publicly in general terms once a week for six consecutive weeks in five newspapers, one of which newspapers must be in each city where service was to be performed; (3) that no advertisement at all should issue until in the judgment of the Postmaster General the needs of the Postal Service were such as to justify the expenditure of the sums involved. *None of those provisions were contained in the December 27, 1950 legislation*, and they were omitted, in my opinion, because Congress knew that it was making no positive requirement in such legislation for public advertisement in all circumstances.

Both the repealed and the new pneumatic-tube statutes provided that:

> Advertisements shall state in general terms only the requirements of the service and shall be in the form best calculated to invite competitive bidding.

Insofar as the new pneumatic-tube statute is concerned, the above-quoted provision is the only place in the entire statute where the word "advertisement" is used. In my opinion, that provision in the new act should not be interpreted as a positive requirement for advertising, but rather as meaning that if the Postmaster General should decide that advertising was necessary, he should phrase his advertisement in general terms and in a manner best calculated to accomplish the purpose of any advertisement, i. e., to encourage competitive bidding. I am of the opinion that Congress was thinking of contracts for pneumatic-tube service in cities other than New York City when it enacted the above-quoted provision, and I think such an

interpretation is justified by the legislative history of the 1950 act which I shall discuss later herein.

I now come to the question whether or not the Postmaster General was free to decide, in each case and without any statutory limitation whatsoever, whether or not he would advertise for bids in connection with a pneumatic-tube mail transmission contract under the 1950 act. I think it is clear that the 1950 act did not expressly require the Postmaster General to advertise for bids, and, as pointed out earlier herein, I do not consider section 429 of the postal laws to be a requirement for advertising. I am of the opinion, however, that R. S. 3709 relating to the general law of advertising government contracts *was* binding upon the Postmaster General in connection with *any* contract he might wish to make for the transmission of mail by pneumatic tube in New York City or elsewhere.[11]

I agree with the majority that the general advertising requirements of R. S. 3709 represent a rule of necessity designed to secure for the Government the best possible services at the lowest possible prices by inviting open, active competition. R. S. 3709 provides that, *unless otherwise provided by law*, contracts for supplies or services for the Government may be entered into only after advertising a sufficient time previously, except in certain specified instances. The 1950 pneumatic-tube statute did not expressly "otherwise" provide. In fact, that statute was very nearly silent on the subject of advertising, and the courts and the Attorney General have held that the Postmaster General is bound by the provisions of R. S. 3709 in the absence of specific postal legislation to the contrary. Presumably Congress was aware of this fact when it enacted the 1950 pneumatic-tube statute without including therein any positive provision requiring advertising. Accordingly, unless the facts of this case establish that it falls within one of the exceptions provided in R. S. 3709, I am of the opinion that the Postmaster General was required to advertise the contract in suit, many of the important terms of which

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[11] The 1950 act provided that contracts covered by that act should be subject to the provisions of law relating to the letting of mail contracts. R. S. 3709 applies to the advertising of mail contracts unless some other law provides otherwise. I think there was no other law applicable to this contract.

were never advertised for public competitive bidding.[12]

In my opinion, the facts and circumstances of the instant case, as revealed by the findings of the court, establish that one, and possibly two, of the exceptions provided for in R. S. 3709 existed to relieve the Postmaster General of the legal necessity for advertising this contract.

The strongest case has been made for the exception which provides as follows:

> (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, • • •

The above exception contains two elements: (1) that only one source of supply is available, and (2) that the Government contracting officer shall so certify.

As to whether or not there was but one source of supply in this case, the record establishes conclusively and the court has found as a fact, that there was only one source in New York City from which the Postmaster General might secure the transmission of the mails by pneumatic tube or other mechanical device, and that source of service was the plaintiff company. For many years prior to the execution of the contract in suit, the Postmaster General had contracted with plaintiff and its predecessors in interest as the owners of the one and only pneumatic-tube mail transmission system in existence in New York City. By the time of this contract, many miles of tube had been installed connecting twenty-two Government post offices in the city. Although the mails could have been transmitted in New York by means other than by pneumatic tube, and, in fact, a substantial portion of New York City mails had for years been transported by truck, Congress had by law given to the Postmaster General the authority to enter into contracts for the transmission of mail by pneumatic tube if, in the opinion of the Postmaster General, the needs of the postal service justified the use of that means of transportation and the expense involved in employing such means. Where,

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[12] In support of the proposition that a contract which by law is required to be advertised, is invalid if not advertised, the majority cites the case of *United States* v. *Ellicott*, 223 U. S. 524. As I understand the holding in that case, the Supreme Court held that the contract in suit was void for uncertainty rather than for lack of advertising or lack of authority.

as here, competitive bidding for the service desired was an utter impossibility, and where the Government contracting officer was vested with full authority to contract for the desired service, both reason and the express terms of R. S. 3709 impel one to the conclusion that a valid and legal contract with the one firm equipped to furnish the service may be *negotiated* without resort to the needless expense of advertising to invite nonexistent competition.

I am under the distinct impression that the majority has been influenced by the fact that the Postmaster General may have acted unwisely in deciding to continue the use of pneumatic tubes for the transmission of mail in New York City in 1950. The various pneumatic-tube statutes in effect prior to December 27, 1950, contained certain limitations on the discretion vested in the Postmaster General which were not included in the 1950 statute. One of those limitations was that before the Postmaster General could advertise for bids for such service he must secure a favorable report from a commission of three postal experts on the necessity and desirability of such a service. Before making the April 24, 1950 advertisement, the Postmaster General did secure such a favorable report and, accordingly, I am of the opinion that he scrupulously complied with all of the provisions of the pneumatic-tube law as it then existed. It is true that the commission of postal experts which had rendered the favorable report, later, on two separate occasions, rendered supplemental reports indicating that because of recent improvements in the facilities of the mail trucking service in New York City, the mails might be more economically transported by motor truck than by pneumatic tube. These supplemental reports were rendered to the Assistant Postmaster General who transmitted them to the Postmaster General for his information. However, I am of the opinion that once the commission of postal experts had rendered its statutory report and the Postmaster General had acted upon it by advertising the contract in April 1950, that commission was *functus officio*, and its subsequent actions and reports could not, as a matter of law, have any binding effect on the Postmaster General. After receiving the favorable report of the commission, the Postmaster General arrived at the determination required of him by the statute then in effect, that in his judgment the needs of the postal service justified the expenditure which would be involved in executing a new contract for the transmission of the

mails in New York City by pneumatic tube; and upon receiving the supplemental adverse reports after the April 1950 advertisement had issued, the Postmaster General continued to be of the same opinion, and so certified to Congress that this contract with plaintiff should be negotiated.

From the point of view of hindsight, this court may believe that the Postmaster General acted unwisely in not heeding the adverse supplemental reports of the commission and in not rejecting plaintiff's bid. But the decision to secure the type of service here involved was by statute committed to the discretion of the Postmaster General and not to the Federal courts. If that discretion was exercised within the limitations imposed by applicable law, as it was in this case, and if the contract ultimately executed was in conformity with the law in existence at the time of such execution, as this one was, then I am of the opinion that there is nothing the courts can or should do about the contract except enforce it. The various comments contained in the majority opinion concerning the availability of trucks to deliver the mails in New York City; the fact that the Postmaster General *might* have secured a short extension of the current pneumatic-tube contract for a period beyond December 31, 1950, sufficient to permit a new advertisement to issue or to permit a further investigation into the wisdom of abandoning completely that system, and the suggestion that mail delivery in New York City would not have broken down entirely if delivery of the mail by pneumatic tube had ceased on December 31, 1950, are all matters which I consider to be beyond the legitimate or proper consideration of this court and to have no bearing on the issue of whether or not the Postmaster General acted beyond the authority vested in him by the Act of December 27, 1950.

In connection with the above-mentioned suggestions of the majority as to what the Postmaster General might and perhaps should have done, the case of *United States* v. *Speed*, 8 Wall. 77, 83, is cited. I am somewhat at a loss to understand the purpose for which the *Speed* case is cited since in my opinion the holding of the Court in that case is quite favorable to plaintiff herein. In the *Speed* case, the Government, appealing from a judgment for plaintiff in the Court of Claims, urged that the contract in suit was unenforceable and not binding upon the United States

because no advertisement for proposals to contract had been issued as required by the Act of March 2, 1861, 12 Stat. 220. The Supreme Court held that while the statute in question required advertisement as a general rule, it also

> • • • invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance.
>
> *It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise.* [Italics supplied.]

In the instant case, the fact that trucks might have been used more economically than pneumatic tubes for the transmission of mail in New York City, is a fact which reflects on the degree of wisdom or skill accompanying the exercise of the discretion lodged in the Postmaster General by the pneumatic-tube law and by the general advertising statute, and the validity of the contract he entered into is not dependent on the degree of wisdom or skill which he exercised.

Since the 1950 act did not contain an affirmative and positive requirement that the Postmaster must advertise for bids to furnish pneumatic-tube service in New York City, and since the general advertising statute (R. S. 3709) provided an exception to the necessity for advertising in the case where there exists but one supplier for the service desired, I am of the opinion that the Postmaster General acted entirely within the grant of authority contained in the 1950 act and within the provisions of R. S. 3709 when he executed the contract in suit without advertising the terms therein which had not been previously advertised.

But the opinion of the majority holds that even though the contract in suit may not have been required to be advertised, once it was advertised in April 1950, the Postmaster General was prohibited by law from awarding a contract which contained terms different from those advertised. In other words, by issuing the advertisement for contract services in a situation where, under R. S. 3709, he was not

required to advertise, the Postmaster General lost the benefit of the exceptions contained in R. S. 3709 and thereafter was required to proceed as though he had been required to issue the advertisement in the first place. This would mean, that having needlessly advertised for bids, the Postmaster General could only award a contract on terms which were identical with the terms in that needless advertisement, and if he entered into a contract whose terms varied materially from the terms needlessly advertised, that contract is void and unenforceable for lack of authority, unless he makes another useless advertisement of such new terms. I am unable to agree with such a proposition and I do not think that the opinion of the Attorney General reported at 36 Op. Atty. Gen. 33, cited in the majority opinion, lends any support to that holding. In the case presented to the Attorney General, the Postmaster General advertised for proposals for the transmission of the mail by aircraft on a certain route from the Canal Zone to points in South America and return. The advertisement for bids specified a price basis and a route not authorized by existing law. Five companies submitted proposals. Subsequently, at the request of the Postmaster General, Congress enacted new legislation which permitted the Postmaster General to contract for the new route and at the higher rates previously advertised. Thereafter, the Postmaster General awarded the contract to the lowest bidder of the five who had submitted bids prior to the enactment of the new legislation. One of the unsuccessful bidders protested the award on the ground that the contract awarded was void because, at the time the bids were invited and received, there was in effect no statute which authorized the Postmaster General to make the contract contemplated by the advertisement. The Attorney General observed that there was, at the time of the advertisement, no statute of *general application* which prescribed any particular method to be followed in inviting bids for postal delivery except R. S. 3951 relating to "general mail lettings," and he was of the opinion that a contract for the transportation of mail by aircraft was not a "general mail letting." He noted that the pneumatic-tube statute then in existence prescribed the precise manner in which advertisements for that service should be made and that the statute authorizing contracts for transportation of the mail by aircraft did not mention the manner of advertis-

ing. The Attorney General concluded that R. S. 3709 rather than the general mail letting statute was applicable to such contracts. Conceding that R. S. 3709 required the airmail contract to be advertised and that the advertisement which issued contained terms not then sanctioned by law, the Attorney General held that the purpose of R. S. 3709 was accomplished if competitive bidding had not been actually discouraged by the Postmaster General. The Attorney General also stated that he could readily conceive of a case where uncertainty in ultimately obtaining statutory authority for the terms advertised might be great, and that the expense to bidders of making bids or putting themselves in a position to perform the contract would be so great that the possibility that a contract might never be awarded through lack of statutory authority, would seriously restrict competition. The Attorney General found, however, that in the case under his consideration, there appeared to be no circumstances which would justify the conclusion that "responsible concerns *equipped* to perform the contract were deterred from entering the competition by any uncertainty as to whether statutory authority would be obtained."

I cannot agree with the statement of the majority herein that the Attorney General in the above opinion based his conclusion as to the validity of the aircraft transportation contract on the fact that the bids had been responsive to the terms of the advertisement. I think he based his conclusion that the contract was valid on his finding that no qualified and responsible bidder was deterred from entering the competition within the meaning of R. S. 3709 under the facts and circumstances of that case. And I think that in the instant case, the facts and circumstances show even more clearly that no responsible or qualified concern was prevented from entering the competition to render the service sought by the Postmaster General because of the failure of the Postmaster General to advertise the terms ultimately incorporated in the December 29, 1950 contract with plaintiff herein.

I now come to the second element of exception (3) of R. S. 3709, i. e., that the fact of only one source of supply *be certified by the Government contracting officer.* The statute does not say what form that certification must take nor to whom it must be made, and we are accordingly at liberty to place a reasonable construction on the

language used in the statute. If the contract in suit had been negotiated by an inferior official of the Post Office Department, I suppose that official would have had to certify the fact of "one source of supply" to the Postmaster General as the head of the department. But the Government contracting officer in this case was the Postmaster General himself. From the outset, he appears to have handled all the negotiations personally, and I would think that in executing the contract on December 29, 1950, without advertising the new terms therein, his very act of such execution amounted to a certification by him that to the best of his knowledge the plaintiff was the only source of supply for the service which was the subject matter of the contract. Since the contracting officer in this case was the head of the department, I can think of no one to whom he might make such a certification unless he made it to Congress, from which body his authority to contract emanated. In my opinion, the Postmaster General did make such a certification to Congress in his identical letters to the Speaker of the House and to the Vice President, asking for legislation to permit him to enter into this very contract. If the Postmaster General had not required new legislation, a simple written statement that there was only one source of supply, placed in the files of the Post Office Department, would have been a sufficient compliance with exception (3) above.

The legislative history of the December 27, 1950 statute shows that the Postmaster General had advised Congress of his wish to enter into a contract for the transmission of mail in New York City with the New York Mail and Newspaper Transportation Company, the plaintiff herein, and that unless the legislation which he was requesting were enacted before the current contract expired on December 31, 1950, there would be a cessation of mail service to that extent in New York City.

I am of the opinion that the legislative history which I am about to discuss not only indicates that the Postmaster General certified to Congress that there was only one concern qualified to render pneumatic-tube service in New York City, but also that Congress by enacting the 1950 act intended that the contract between the Postmaster General and this plaintiff might be executed *without previous advertising.*

The following statement appears in House Report No. 3144, dated December 5, 1950, 81st Congress, 2d Session, on S. 4102 which became the Act of December 27, 1950:

> This bill will permit the Postmaster General to enter into contracts for terms of not to exceed 10 years (the terms now authorized by law), for the transmission of mails by pneumatic tubes or other mechanical devices. The maximum per annum rate authorized to be paid for such service, at *New York* would be increased from not to exceed $12,000 per mile to not to exceed $15,500 per mile for a period of 10 years, after which time the annual rate of expenditures per mile shall not exceed $12,000.
>
> The *owners of the pneumatic tube system in New York City* must convert the system from nonstandard direct current to standard alternating current. The source of power supply, the Consolidated Edison Co. of New York, Inc., has requested *that it be advised on or before December 31, 1950,* whether or not the power machinery operating the pneumatic tube system will be converted to the use of alternating current. *If this concern is notified that the conversion will be made,* then it will continue to supply nonstandard direct current for a reasonable length of time in order to permit the work of making the conversion to be completed.
>
> The exact cost of the conversion cannot be determined accurately without detailed field investigation, but it is estimated that the conversion cost will approximate $300,000. *The owners of the tube system operating in the city of New York, the New York Mail and Newspaper Transportation Co.,* cannot absorb the expense of making the conversion of the machinery, pay operating and maintenance expenses and obtain a fair profit on its capital outlay at the existing statutory rate of pay, namely, $12,000 per mile.
>
> The per annum rate paid *at other cities* for the transmission of mails by pneumatic tubes will be at the most favorable rates obtainable, subject to amounts appropriated therefor by Congress.
>
> The bill also clarifies existing law with respect to such pneumatic tube contracts. These contracts expire December 31, 1950, and *expeditious action* on this

legislation is required in order that its terms may be utilized *in negotiations for the new contract.*

* * * The legislation has the approval of the Bureau of the Budget and was introduced at the request of the Post Office Department. [Italics supplied.]

The statement quoted above was followed in the report by the letter of August 25, 1950, from the Postmaster General to the Speaker of the House, urging that the proposed legislation be enacted during the present session of Congress because the existing contract would expire on December 31, 1950.

When, on September 13, 1950, the bill was brought up on the floor of the Senate for a vote, Senator Humphrey stated that unless the bill was passed, the entire transmission of mail by pneumatic tube in the Manhattan district and the general New York area would be interrupted and severely damaged. In answer to a question concerning the increased cost under the bill, Senator Humphrey stated that the bill had been adopted unanimously by the Senate Committee which had understood that it was imperative that the bill be passed quickly. He stated at page 14665 of the Congressional Record, Vol. 96, Part 11:

* * * That is why I, as the chairman of the subcommittee, introduced it, in order to carry on *the mail service in the New York area.*

Mr. LANGER. Can the Senator tell us the total amount *the company* is receiving from the Government? [meaning the plaintiff company supplying service in New York].

Mr. HUMPHREY. I do not recall that we have that figure. I will check the report. Yes; the last figure we have is $513,911.50, which includes power, labor, and all operating expenses.

Mr. LANGER. That is more than half a million dollars for New York City alone.

Mr. HUMPHREY. For the transmission of the mail by pneumatic tube and other mechanical devices; that is correct.

Mr. LANGER. Does not the Senator from Minnesota think that amount is a little bit high?

Mr. HUMPHREY. The Senator from Minnesota acted only upon the information we had from the Post Office

> Department *and on the urgency of the request*, I could not help but feel that since it was a very technical subject, about which I knew very little, the only advice to follow would be that of the Postmaster General, who seems to be doing a job of economizing in the Post Office Department. I did not think he would go overboard in his recommendation. [Italics supplied.]

In the Report (No. 2500) of the Senate, rendered September 1, 1950, 81st Congress, 2d Session, it is noted that the Comptroller General had called to the committee's attention the fact that in cities *other than New York City*,[13] the per mile per annum ceilings in existing law were *removed entirely* by the proposed legislation. The report then stated that with respect to the removal of the existing price ceiling in *cities other than New York*, the proposed law (act of 1950) contained sufficient requirements "as to competitive bidding."

In my opinion the above described legislative history of the December 27, 1950 act indicates that Congress knew, *upon certification by the Postmaster General*, that in the City of New York there was but one source of supply for transmission of the mails by pneumatic tube and that such source of supply was the New York Mail and Newspaper Transportation Company. This history also makes it plain that one of the primary purposes of the 1950 act was to permit the Postmaster General to *negotiate*, without prior advertising, with the New York Mail and Newspaper Transportation Company for a contract to furnish transportation of the mails in New York City for 10 years, beginning on January 1, 1951, on terms not authorized by existing law, among which terms were an increased rate of compensation per mile per annum, and the right to negotiate a contract in New York which would *not be subject* to annual appropriations for the Post Office Department. The committee reports indicate that in cities other than New York, competitive bidding might be possible, and if so, should be invited, and that contracts for pneumatic tube service in such other cities *would* be subject to annual appropriations for the Post Office Department.

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[13] The proposed legislation raised the compensation limit in New York but only for a period of 10 years at the expiration of which time the ceiling reverted to the amount contained in the old law.

From the above it is clear to me that plaintiff has brought its case squarely within the third exception to R. S. 3709 in that plaintiff was the sole source of supply for the services required by the Postmaster General, and the Postmaster General so certified to Congress. It is also obvious to me that any positive requirement for advertising that may have existed in the pneumatic-tube statute in effect prior to the Act of December 27, 1950 by virtue of the language therein providing that the Postmaster General was authorized to enter into pneumatic-tube contracts "after public advertisement once a week" etc., was eliminated from the law upon the enactment of the 1950 statute, at least insofar as that law covered pneumatic-tube contracts in New York City, because that new law omitted the language "after public advertisement" and also omitted all other provisions in the prior law relating to the manner of making advertisements. Furthermore, the House Report made specific reference to granting the Postmaster General the authority to *negotiate* a pneumatic tube contract in New York City. As the Senate Report on the 1950 law indicates, the provision in the 1950 law requiring that "no contract shall be awarded except to the lowest responsible bidder tendering full and sufficient guaranties to the satisfaction of the Postmaster General of his ability to perform satisfactory service" was intended to apply to cities other than New York, where the new law imposed no ceiling on the compensation per mile per annum which might be paid for such service.

Finally, the $15,500 rate per mile per annum ceiling authorized by the new law for the New York City contract was understood by Congress, and the 1950 act so provided, to apply only to the New York contract. This ceiling was arrived at on the basis of the proposal made by this plaintiff and was by law authorized only for the 10 years during which plaintiff's contract to be negotiated was intended to run.

I am unable to conceive of a clearer case where advertising by a Government official was *not* required either by the statute authorizing the particular contract in question (64 Stat. 1118), or by R. S. 3709 covering the advertisement of Government contracts in general. Since advertising was not necessary, I cannot understand how a contract containing terms, some of which had not been advertised, can be

invalid for lack of advertising, or can be said to have been entered into by the Postmaster General without statutory authority and contrary to law.

Although plaintiff need only establish that its case falls within one of the exceptions in R. S. 3709, the majority suggests that "there is no indication of exigency." (R. S. 3709 (2)). I am of the opinion that the applicable law vested in the Postmaster General the discretion and sole right of decision to determine whether or not the exigencies of the situation justified his dispensing with advertising. Unless the record in this case indicates that such discretion was exercised dishonestly and in complete disregard of the facts, the decision of the Postmaster General should be considered final regardless of any possible lack of wisdom on his part in exercising that discretion. In the instant case the record, the reports of the congressional committees, the debate in the Senate, and the letters of the Postmaster General, all indicate that the Postmaster General honestly believed, and that Congress was so advised, that there was need for expeditious passage of the requested legislation so that there would be no break in the pneumatic-tube transmission of mail in New York City when the current contract expired on December 31, 1950. The House Report referred to above indicates that the Consolidated Edison Company of New York was asking for a firm commitment by December 31, 1950, that the power machinery used to run the pneumatic-tube system in New York would be converted from nonstandard direct to standard alternating current. It seems obvious that no such commitment could have been made on the basis of a short term interim contract such as that suggested by the majority. The expense involved in the required conversion could only be justified if the new contract was to last for 10 years. The contract which had been negotiated by the parties provided that the cost of such conversion would be borne by the Government and would be amortized over the entire life of the proposed contract. This was one of the terms negotiated which necessitated the new legislation and Congress was so advised. The legislative history of the 1950 act discussed above indicates to me that Congress was willing to accept the decision and the word of the Postmaster General that mail service in New York City would be seriously impaired if the current contract were allowed to expire on December 31, 1950, with-

out legislation being previously passed to enable the Postmaster General to execute the new contract which had been negotiated to supply continuous service in New York City. I think that in the opinion of the Postmaster General and in the opinion of Congress, a true exigency existed which required that the new contract be executed without delay. Despite the fact that subsequent events may persuade the majority that a delay would not necessarily have been fatal, I believe that the plaintiff has brought his case within the exception provided in R. S. 3709 (2). Accordingly, I would hold that the contract, executed on December 29, 1950, without prior advertisement, is a valid contract binding on the Government.

Finally, I note that the majority states that if the contract in suit had been drawn in conformance with the April 1950 advertisement, a second advertisement would not have been necessary. I can only suggest that if the contract had been in accordance with the April advertisement, there would have been no necessity for the enactment of the December 27, 1950 statute, since the terms of the April advertisement were all within the scope of existing law.

The majority has held that plaintiff is entitled to recover on certain but not on all of its claims. I agree that plaintiff should recover on the claims allowed by the majority, but because I am of the opinion that the contract was an authorized and valid one, I would allow the plaintiff to recover under the usual rules applicable to damages for breach of contract. With respect to certain of its claims, I am of the opinion that plaintiff has not established its right to recover. Because my reasons for thinking plaintiff is entitled to recover on some of its claims are different from those expressed by the majority, I shall discuss each of the claims presented.

(a) *Unreimbursed costs of power conversion equipment.*

Paragraph 2 (a) under *Variable Costs* in the contract provided as follows:

> The contractor in reliance upon this contract and the term of the contract is committing itself to expend a sum now estimated at $350,000 to acquire and install equipment to convert alternating current to di-

rect current [sic] for the operation of the tube system. It is understood and agreed that Schedule A shall contain an item which shall represent the annual payment required for even amortization over the 10-year term of this contract of such cost when finally determined *with interest at 3%* per annum. * * * [Italics supplied.]

The contract then provided, under the section headed Variable Costs, for reimbursing plaintiff for its costs of acquiring and installing the conversion equipment in the event of termination of the contract by plaintiff under various circumstances.

During 1951 and 1952 plaintiff spent $214,870.13 to acquire and install conversion equipment, and reported such charges to the Post Office Department, as required by the contract. Following an audit by the Post Office Department of plaintiff's books and records for the years 1951 and 1952, the Department accepted the charge as the cost of conversion for the purpose of calculating the monthly payments to be made to plaintiff under the contract in reimbursement of such cost. During the years 1951, 1952 and 1953, the Post Office Department reimbursed plaintiff on account of such conversion expenditure in the sum of $73,305.66 as principal and $10,995.84 as interest at 3% on the unpaid balance. Such reimbursement payments were included in the monthly payments made by defendant to plaintiff under the contract. No further payments in connection with this item have been made by defendant to plaintiff. Accordingly, there is due and owing plaintiff from defendant the principal amount of $141,564.47 ($214,870.13—$73,305.66), *plus interest* on such unpaid principal at the rate of 3% per annum from December 1, 1953, to date of settlement. Defendant's arguments against plaintiff's right to recover on this item, completely ignore the clear provisions of the contract under which the Post Office Department obligated itself to reimburse plaintiff for this expenditure.

(b) *Cost of set of new carriers.*

The contract provided in paragraph 2 (a) under the section *Variable Costs*, in pertinent part as follows:

* * * It is further understood and agreed that the contractor in preparation for adequate service under this

> contract from time to time will contract or arrange for the purchase of sets of new carriers and that such contracting or arrangement must be made at a considerable length of time before the carriers can be delivered and put into use.

The contract further provided under the same section for reimbursement to plaintiff of its costs relative to new sets of carriers in the event of the termination of the contract under various circumstances.

During 1953 plaintiff contracted and arranged for the purchase of a new set of carriers for use in the system in the fall of 1954. The order for the manufacture of the new carriers was placed with the Lamson Corporation, an affiliate of plaintiff. It had been the custom of plaintiff for a period of years to have the carrier shells manufactured by the Lamson Corporation.

Immediately after defendant notified plaintiff, on December 7, 1953, that the pneumatic tube system would continue to be shut down until further notice, plaintiff suspended work on the new carriers. Plaintiff cancelled its contract with the Lamson Corporation as to any uncompleted portion following plaintiff's letter of January 23, 1954 declaring the contract terminated for defendant's breach.

The termination charges of Lamson Corporation to the plaintiff included no item for profit. The total adjusted cost to plaintiff on such cancellation and termination of its contracts and arrangements for the purchase of the new carriers was in the amount of $30.290.56. Included in the termination charges of Lamson Corporation to plaintiff was the sum of $2,739.04 representing inventory of the Lamson Corporation in existence prior to its receipt of plaintiff's purchase order in June 1953. Although the record establishes that of this amount $1,233.86 would have been expended in the production of the contract for the set of new carriers, if that contract had been completed, it is not shown that the inventory represented by that amount was purchased for this contract or could not have been used on other work of the manufacturer. I am of the opinion that plaintiff's claim of $30,290.56 is excessive by the amount of $2,739.04. Plaintiff should recover $27,551.52 which is reasonable and no part of which has been paid by defendant.

(c) *Payment for December 1953 expenses.*

The contract obligated the Post Office Department to pay the plaintiff monthly amounts calculated in accordance with the terms of the contract. The amount which became due to plaintiff for the month of December 1953, excluding any amount representing reimbursement of principal cost of conversion equipment or interest thereon, disposed of hereinbefore, was the sum of $27,960.94. Plaintiff should recover this amount, no part of which has been paid by defendant to plaintiff.

(d) *Expenses of January 1954.*

Following receipt, on December 30, 1953, of the letter from the Postmaster General of December 29, 1953 (finding 26), plaintiff maintained itself in a position of readiness to resume service if the defendant desired service resumed (findings 27, 28, and 41). Pursuant to its letter to defendant of January 7, 1954, in which plaintiff advised defendant that unless defendant rescinded its action of December 29, 1953, by January 22, 1954, plaintiff would declare the contract terminated for breach by defendant, plaintiff, on January 23, 1954, did so notify defendant of its termination of the contract for defendant's breach and proceeded to release its employees as rapidly as possible thereafter. Wages and salaries paid by plaintiff to its employees for services in January 1954, and other normal expenses incurred in January 1954, amounted to $8,241.69. Such expenses were reimbursable to plaintiff under the terms of the contract. Included in this item is $2,000 representing that part of the 1953-1954 special franchise tax owed by plaintiff and allocable to January 1954. The matter of plaintiff's special franchise taxes is considered in finding 47 which covers plaintiff's taxes for the second half of the 1953-1954 tax year, including the $2,000 allocated to January 1954. Accordingly I would eliminate the $2,000 item from plaintiff's reimbursable expenses for January 1954 and consider it in connection with the issue of plaintiff's right to recover the second installment of its 1953-1954 special franchise taxes. Plaintiff should recover $6,241.69 as expenses incurred under the contract during January 1954.

Defendant contends that plaintiff could have mitigated defendant's damages by releasing its employees on December 30, 1953, when it received the Postmaster General's letter stating that the contract was being cancelled for invalidity or pursuant to Postal Regulation 97.67. In view of the abruptness of defendant's action and the questionableness of defendant's legal position, I think plaintiff acted prudently and properly in asking defendant to reconsider and rescind its action and in holding its organization in readiness to continue performance for a reasonable time. The 23 days during which plaintiff kept its organization in a position to resume operations does not seem to be unreasonable, nor does such action amount to a failure by plaintiff to mitigate damages under the circumstances of this case.

(c) *Anticipated net profits of plaintiff for 1954-1960.*

Plaintiff claims the right to recover anticipated net profits. Where such profits can be proved with reasonable certainty, are not legally remote, and can fairly be said to be within the contemplation of the parties, they are recoverable as damages in a suit for breach of contract. *United States* v. *Behan,* 110 U. S. 338; *Chain Belt Company* v. *United States,* 127 C. Cls. 38. In the instant case plaintiff has established the cost of performance of the contract with sufficient certainty to enable the court to determine the profits which plaintiff might reasonably have anticipated.

Under that part of the contract of December 29, 1950, entitled *Variable Costs,* it is stated in part:

> * * * It is, acordingly agreed that the compensation to be paid the contractor for its services hereunder, and as rental for the leased property shall be for the calendar year 1951, the sum of $352,912.08 and shall be for each succeeding year the sum of $163,972.31, and in addition to said sum in each succeeding year the amount of the contractor's costs for the preceding calendar year of those items listed on Schedule A, annexed hereto and made a part hereof, but in no event shall the total compensation payable for any calendar year exceed the sum of $387,628.65. * * *

The Schedule A referred to above included various taxes and operating expenses, salaries, pensions, maintenance and repair, patterns, jigs, fixtures and amortization of the cost of power conversion equipment. The sum of $352,912.08 quoted above included an estimated amount to cover the 1951 Schedule A costs. In 1952 the sum of $350,691.69 paid to plaintiff included the exact amount of its Schedule A 1951 costs and the $163,972.31. In 1953 plaintiff received payment in the sum of $324,149.95 at a rate which would reimburse it for its 1952 costs with the qualifications stated in finding 46. Nothing was paid to represent the 12th month of 1953 during which time contract operations were suspended by defendant's notice to plaintiff. Plaintiff's claim for that month has been discussed hereinbefore.

The ceiling amount set in the contract is the product of the number of miles of the tube system, i. e., 25.0083 times $15,500, the ceiling rate of expenditure for the transmission of mail established by act of December 27, 1950.

Out of the sum of $163,972.31 provided in the contract as the fixed sum plaintiff was to receive for each year (plus variable costs) the plaintiff was to meet its other expenses of carrying on its business and realize its profits. Plaintiff's theory for computing its net profits is to deduct from $163,972.31 its constant costs each year, actual or estimated, which are not costs such as included in Schedule A to the contract. Plaintiff's claim for the years 1954 through 1960 is as follows:

For 1954	$136,301.59
For each of the years 1955-60	139,241.59
For the aggregate of these 7 years ..	971,751.13

The constant costs which plaintiff would deduct as illustrated above are not defined or referred to in the contract. As used by plaintiff they include, among other things, such general expenses as life and health insurance, supplies, travel, professional services, directors' fees, postage, and, as operating expenses, clerical and stenographic salaries, rent, depreciation of machinery, telephone, and supplies. Plaintiff's claimed actual constant costs for 1949 were $19,972.31. In 1950 they were $25,050.67; 1951, $23,396.83; 1952, $27,984.01; 1953, $27,626.10. The estimate of such costs for 1954 is $27,670.72 and for 1955 and subsequent years to 1960, inclusive, $24,730.72 for each such year.

The plaintiff prepared estimates of its variable costs for the years 1954 to 1959 for classifications of expense similar to those tabulated in Schedule A of its contract. Such costs would have been recovered had the contract run its full course through 1960. It is reasonable to conclude that plaintiff's constant costs, which were chargeable against its constant allowance under the contract for the determination of its contract income, would follow substantially the same ratios of variations as its variable costs.

A fair and reasonable determination of plaintiff's anticipated contract profits for the calendar years 1954 through 1960 is $952,008.88. The following tabulation reflects the basis for this determination:

Years	Variable costs exclusive of amortization charges		Constant costs and contract allowances: Costs	Constant costs and contract allowances: Allowances	Income from contract operations
(a) Actual results of operations:					
1951	$159,247.16		$23,396.83	$163,972.31	$140,575.48
1952	171,559.30		27,984.01	163,972.31	135,988.30
1953	183,844.47		27,626.10	163,972.31	136,346.21
Totals ..	514,650.93		79,006.94	491,916.93	412,909.99
Average	171,550.31	100%	26,335.65	163,972.31	137,636.66
(b) Projected operations for succeeding years based upon estimates as follows: (*)					
1953	183,844.47	107.17%	28,223.92	163,972.31	135,748.39
1954	176,818.60	103.07%	27,144.15	163,972.31	136,828.16
1955	173,747.10	101.28%	26,672.75	163,972.31	137,299.56
1956	178,847.10	104.25%	27,454.55	163,972.31	136,517.76
1957	182,866.10	106.60%	28,073.80	163,972.31	135,898.51
1958	186,755.10	108.86%	28,668.99	163,972.31	135,303.32
1959	192,554.10	112.24%	29,559.13	163,972.31	134,413.18
Totals ..	1,275,432.57		195,797.29	1,147,806.17	952,008.88

(*) The recoverable variable costs for 1954 are represented by the actual variable costs for 1953, other amounts are estimates which would be recoverable the succeeding year, none of which would exceed the maximum permissible under the contract.

Defendant concedes that if the contract in suit was valid and not terminated according to law, the plaintiff is entitled to recover its anticipated profits. Defendant contends, how-

ever, that plaintiff's claim for anticipated profits is grossly inflated in that it failed to take into account plaintiff's annual interest expense in connection with plaintiff's indebtedness incurred prior to the execution of this contract and representing loans to plaintiff by its parent company to finance extension of plaintiff's tube lines to various post offices in New York City. It is defendant's position that the interest in the approximate amount of $642,000 for seven years which plaintiff had to pay on its indebtedness during the contract term following cancellation should be included in computing plaintiff's damages or income under the cancelled contract.

I am of the opinion that defendant's contention is not sound. The payment by a contractor of interest on preexisting indebtedness for capital invested in the business is not a cost of performing the contract and is not an element to be considered in computing the contractor's profit or loss resulting from the performance of the contract. That plaintiff might have had to use its profits earned through performance of the contract in reducing the preexisting debt does not change the character of such profits insofar as that contract is concerned. The fact that the contract in suit constituted plaintiff's only business and therefore the only source from which plaintiff could derive the money to pay the interest on invested capital, does not make such interest a cost of performing the contract.

If, following the classic rule of damages, the court is to render a judgment which will place plaintiff in as good a position as it would have been had it been permitted to complete performance of this contract, that judgment should represent the excess of the contract price over the *expense* which plaintiff was spared by virtue of the fact that it did not have to complete performance under the contract for that period. *Miller* v. *Robertson*, 266 U. S. 243, 257.

The expense represented by the annual interest payments which plaintiff had to make on the $2,000,000 invested by the parent corporation in plaintiff's business was a fixed expense to the plaintiff which continued notwithstanding the contract in suit. While the 1951 contract price negotiated by the parties on the basis of plaintiff's 1949 operating experience (under the contract then in existence) was set in an amount which would cover plaintiff's interest on, and amortization of, the capital loan which it had made to install the tube system, as well as to cover plaintiff's un-

compensated operating expenses under the contract, defendant's cancellation of the contract while it still had seven years to run obviously did not relieve plaintiff of its obligation to pay the interest on the capital loan. The servicing of this loan by plaintiff as to interest or amortization, or both, was a corporate liability of plaintiff and cannot properly be regarded or treated as an expense of performing its contract with the United States, and such interest was not reduced in any way by the cancellation of the contract. The record shows that the money which plaintiff would have received under its contract with defendant would have been sufficient to reimburse plaintiff for its actual operating costs of performance and also to enable plaintiff adequately to service the loan to the parent company. While the cancellation of the contract did relieve plaintiff of the operating expenses of the contract it is clear from every standpoint that it did not relieve plaintiff of the expense of servicing the loan.

From the above it seems clear that the expense to plaintiff of servicing the loan from its parent corporation was not an operating expense in connection with the performance of the contract with defendant and should not, therefore, be taken into consideration in estimating plaintiff's damages suffered by reason of defendant's wrongful cancellation of the contract prior to completion.

I am of the opinion that plaintiff is entitled to recover $952,008.88 representing anticipated profits under the contract for the years 1954 through 1960.

(f) *Excess of 1953 over 1952 variable costs.*

If the contract in suit had continued in force throughout the calendar year 1954, plaintiff would have received in 1954 the excess of its 1953 variable expenses over its variable expenses for 1952 which amounted to approximately $12,285.16. Plaintiff claims this item as part of the damages which it is entitled to recover for defendant's breach of its contract in 1953.

In finding 42 and earlier in this dissenting opinion it was noted that plaintiff received from defendant under the contract the sum of $324,149.95 for eleven months of that year. The contract allowance for December 1953 is reported in finding 40, other than amortization charges in connection with the power conversion which was allowed in full for the unamortized portion thereof in finding 34. The payments

and the amount reported for 1953 were based in part upon the variable expenses incurred by plaintiff for 1952 and represent recoupment in full for such expense.

The contract provided that, except for the first year of operations thereunder, the recoupment of variable expenses for any current year would be recovered in payments by defendant during the following year.[14] Thus, the actual expense for variables during the last year of contract operations would never be recovered. The variable expenses paid during the first year of operation under this contract, i.e., in 1951, were based upon estimated sums which included an allowance of $40,250 for the amortization of the power conversion cost. The actual amortization taken by plaintiff in its 1951 variable costs was only $18,494.60. Thereafter, the amortization was at the rate of $22,983.41 annually. The calendar year 1953 was the last year of plaintiff's operations under this contract. Under the circumstances and under the terms of the contract there is no basis for allowing plaintiff to recover as damages this item of variable costs. However, plaintiff's 1953 variable costs actually incurred in that year have been included in the estimates which I have projected over the following years for the purpose of determining plaintiff's anticipated profits for those years.

(*g and* h) *New York City special franchise taxes.*

One of the items of variable costs under Schedule A of the contract is "Special Franchise Taxes—Manhattan." The second half of plaintiff's special franchise tax on its pneumatic-tube system for the tax year July 1, 1953 to June

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[14] The contract provides:

"Anything to the contrary hereinabove notwithstanding, no additional payment or refund shall be due after the close of the last contract year of 1960 as a result of the contractor's actual charges properly chargeable to the expense accounts set forth in Schedule A for the calendar year 1960.

"In the event this contract is terminated prior to the expiration of the term of this contract, the principles and procedures above set forth shall be followed as closely as may be in the determination of any additional payments from the Government, or refund from the contractor to the Government, arising out of the adjustment of the cost items in Schedule A applicable to the year in which the termination occurs, and such additional payment, or refund, shall be made promptly after such determination."

30, 1954, was due on April 1, 1954 in the amount of $12,792.18 and had the contract continued during its term, this tax payment of $12,792.18 would have been included as a variable cost for the year 1954 to which plaintiff would have been entitled to reimbursement. Plaintiff says that it owes such tax to the City of New York, but the amount of such tax has not yet been paid by plaintiff.

The State Equalization Board of New York assessed the value for special franchise tax purposes of plaintiff's pneumatic-tube system for the tax year July 1, 1954 to June 30, 1955 in the amount of $712,000. Plaintiff duly protested the assessment of such value in a proceeding before the Supreme Court of the State of New York on May 18, 1955, requesting that the assessed valuation of its system be reduced to zero because of the worthlessness of the pneumatic-tube system resulting from the termination of its contract with the Government.

Based on the assessed valuation of $712,000, New York City has levied a special franchise tax on plaintiff for the year July 1, 1954 to June 30, 1955 in the amount of $26,700, payable one half ($13,350) on October 1, 1954, and one half on April 1, 1955. Plaintiff has not paid any part of this tax.

If it is determined by the Supreme Court of the State of New York that for the 1954-1955 tax year plaintiff's pneumatic-tube system had any value for purposes of special franchise tax, plaintiff will be obligated to pay the tax based upon whatever valuation is assessed pursuant to the decision of the New York courts. Any special franchise tax so payable by plaintiff will be one of the items of variable cost under Schedule A of the contract under the heading "Special Franchise Taxes—Manhattan." Had defendant not breached the contract and instead permitted the contract to remain in force during its term, any special franchise tax payments made by plaintiff on October 1, 1954 and April 1, 1955, would have been reimbursable to plaintiff under the contract and for this reason plaintiff claims that it is entitled to recover any special franchise taxes it may be required to pay for the tax year 1954-1955.

Defendant resists this claim on the ground that plaintiff has not actually paid either the second half of the taxes for 1953-1954 or the taxes assessed (and protested by plaintiff) for the tax year 1954-1955.

As to the special franchise taxes assessed for the tax year 1953-1954, such taxes were incurred while the contract was

still in force and as a result of the contract. One half of such taxes have been paid by plaintiff and reimbursed by defendant under the contract. The remaining half of the 1953-1954 taxes which were due in April 1954 were not paid by plaintiff. However, since plaintiff's liability for the special franchise tax for 1953-1954 was incurred as a result of the contract which was in full force and effect at the time the tax was assessed, it would appear to represent an expense incurred in the performance of the contract and therefore a proper item of damage in this suit for damages for breach of the contract. *United States* v. *Behan*, 110 U. S. 338. Why plaintiff has not paid the second installment of the 1953-1954 special franchise tax does not appear from the record, but apparently plaintiff concedes its liability for such payment and the matter of this tax is not in litigation in New York. Accordingly there should be included in plaintiff's judgment herein the item of $12,792.18 representing the second half of its 1953-1954 special franchise taxes.

As to the special franchise taxes assessed for the tax year 1954-1955, such taxes, if validly incurred, were incurred after the contract, rightly or wrongly, was terminated and cannot be said to have been incurred as a result of plaintiff's contract with the United States. Accordingly, whether or not plaintiff is ultimately required to pay the tax assessed or some lesser tax, I am of the opinion that such expenditure when made will not be a proper item of its damages arising out of the breach of this contract by the Government.

(i) *Removal of equipment from Government-owned stations.*

The contract in suit provided that the contractor would at its own expense remove the tubes, power plants, receiving and dispatching apparatus, equipment and devices from Government-leased premises, at the expiration of the contract term, or, at the termination of the contract, or at the termination of the lease of such leased premises, if requested to do so by the Postmaster General (finding 49). Plaintiff was under no contractual obligation to remove its equipment from Government-owned premises.

At the time of the cancellation of the contract on December 29, 1953, defendant insisted that plaintiff remove the above equipment from both Government-leased and Gov-

ernment-owned premises at plaintiff's expense and warned plaintiff that if it did not do so, the Government would dispose of the equipment and credit the proceeds against the cost of removal. Plaintiff advised defendant by letter of March 17, 1954, that defendant had no right under the contract to require plaintiff to pay the cost of removal of equipment from Government-owned premises, or to dispose of plaintiff's equipment. Finally, and under protest, plaintiff advised defendant that it would remove the equipment from both Government-owned and Government-leased premises and would include the cost of the removal from Government-owned premises in its claim against defendant.

Plaintiff sought purchasers and, on March 24, 1954, entered into a contract with a salvage company for the purchase of all of plaintiff's equipment located in both Government-owned and Government-leased post office premises. The purchase price was $60,000. The contract between plaintiff and the salvage company provided that plaintiff would pay to the salvage company the sum of $25,650 as the cost to the salvage company of removing plaintiff's equipment from the Government-owned premises. The commissioner has found that this was the best offer made to plaintiff and was a reasonable one and we have adopted that finding. The equipment was completely removed by August 1954.

Defendant concedes, as it must, that the contract obligated the plaintiff to pay the cost of removal of equipment only when it was removed from Government-leased premises, but defendant urges that plaintiff is not entitled to recover as damages the cost it incurred in removing equipment from Government-owned premises because the contract did not obligate the Government to pay the costs of such removal. It is true, of course, that plaintiff could have refused to remove the equipment from the Government-owned premises when it was ordered to do so by the Government and, if defendant carried out its threat to remove the equipment itself and credit the proceeds realized by it for such equipment against the cost of removal, plaintiff could have sued the Government for the salvage value of the equipment. However, it appears to me that the course plaintiff followed was a proper one in view of its obligation to mitigate the damage that would have resulted from defendant's proposed action. *Chain Belt Company* v. *United States*, 127 C. Cls. 38, 57, 58. Plaintiff should re-

cover its reasonable cost of removing the equipment from Government-owned premises, which the court has found to be $25,650.

The Government has interposed two counterclaims which the majority has disposed of by simply noting that they will be dismissed. Under the holding of the majority that the contract in suit was invalid for lack of authority, it may be that the Government's first counterclaim has some merit. However, under my view of the case, both counterclaims should be dismissed for the reasons which I shall set forth below.

Defendant's first counterclaim.

Defendant contends that the contract of December 29, 1950, was made "pursuant to discussions and negotiations, rather than pursuant to public advertisement as required by law with the result that the public competition in the letting of mail contracts contemplated by law was suppressed and defeated, and said purported contract was executed contrary to law, and is void and of no force and effect." Defendant claims that money paid by defendant during the period from January 1, 1950 to November 30, 1953, was therefore illegally paid under an invalid contract and was greatly in excess of the fair and reasonable value of the services rendered by plaintiff and that defendant is entitled to recover from the plaintiff the total amount paid less such sum as plaintiff might prove to be the fair and reasonable value of such services.

The commissioner has found that the year 1950 is not involved since the contract in suit does not cover that year. The commissioner has also found that the total sum paid to plaintiff by defendant for 1951, 1952 and the first 11 months of 1953 was $1,027,753.72 and represented the reasonable value of plaintiff's services during that period. Since I am of the opinion that the contract was a valid one, there is no legal basis for defendant's first counterclaim which should accordingly be dismissed.

Defendant's second counterclaim.

Defendant claims that plaintiff owes it $39,685 for the repair of leased post office premises and $1,295 for the repair of Government-owned post office premises.

The only provision in the contract relating to removal of property owned by plaintiff, repair of the premises or res-

toration of premises, provided that at the termination of the contract the contractor would remove his equipment from *leased* post office premises (see finding 49). The contract contained no provision requiring the plaintiff to restore premises which had been altered to accommodate plaintiff's tube system to its original condition, although such provision had been included in contracts prior to the one executed on July 1, 1948. Accordingly, plaintiff's only obligation under the contract regarding removal was to remove with due care its property from leased post office premises. In the absence of a contract provision covering the degree of care to be used, the law will imply an obligation on plaintiff's part to exercise ordinary care in such removal. *Chain Belt Company* v. *United States, supra.* There was no contractual obligation on plaintiff to restore the premises to their *original* condition.

In order to establish its right to recover on its counterclaim for the cost of repairs, defendant had the burden of showing that the removal work done by plaintiff was not done with ordinary care. There is no evidence in the record that plaintiff failed to use ordinary care in removing its equipment from defendant's premises and accordingly defendant has not established its right to recover on this counterclaim and I am of the opinion that it should be dismissed.

In summary, the various items of plaintiff's claims for damages for breach of its contract and the amount which I would hold to be recoverable, are as follows:

Item of claim	*Amount Recoverable*
(a) Unreimbursed cost of power conversion equipment	$141,564.47
(b) Cost of new set of carriers	27,551.52
(c) Payment for December 1953 expenses	27,960.94
(d) Expenses of January, 1954	6,241.69
(e) Anticipated net profits for 1954-1960	952,008.88
(f) Excess of 1953 over 1952 variable costs	0
(g) New York City special franchise taxes for the second half of the 1953-1954 tax year	12,792.18
(h) New York City special franchise taxes for the t[illegible] year 1954-1955	0
(i) Removal of equipment from Government-owned stations	25,650.00
Total	$1,193,769.68

MADDEN, *Judge*, dissenting:

I agree with what Judge Littleton has written in dissent, but, in order to give a somewhat different emphasis to what I regard as the crux of the case, I write this separate opinion.

I would attach little importance to the advertisement which took place in the spring of 1950, except as an historical fact confirming what was already obvious, i.e., that the plaintiff was the only possible potential contractor for a pneumatic tube mail contract in New York. I would pass, then, to the Act of December 27, 1950, under which the contract in suit must stand or fall.

The statute was a general statute, to be applicable anywhere, at any time in the future, for the transmission of mail by pneumatic tubes or other mechanical devices. Except in its section 3, which was particularly pointed to the New York situation, it had no more applicability to the New York situation in 1950 than to a potential situation in Chicago or Los Angeles in 1960.

Section 2 of the Act calls for advertising for bids and provides that no contract shall be let except to the lowest responsible bidder. In the instant case there was no advertising, if we disregard what had taken place months before; there was no bidder; and the contract was arrived at by negotiation. If the 1950 statute required advertising, the requirement was not satisfied, and the contract was invalid.

I think the 1950 statute did not require advertising, in the circumstances. The general statute relating to advertising in the letting of Government contracts is R. S. 3709, as amended, 41 U.S.C. (1946 ed.) 5. It says:

> Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $100, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) * * *.

It would be impossible to imagine a situation in which exception (3) of this statute would be more clearly complied with, than the mail tube situation in New York in 1950. The postal officials and the managers of the 1950 legislation in Congress knew to a certainty and so stated in the committee reports, that if pneumatic tube service was to continue in New York, it would be continued by the plaintiff.

In the face of this knowledge, and the further knowledge that the existing contract with the plaintiff would expire four days later, and that therefore the enactment of the legislation was urgent, the court holds that Congress, on December 27, 1950, required the Postmaster General to go through the futile motions and subject the Government to the delay and confusion and expense of advertising for bids.

I think the general statute, section 5, quoted above, relating to advertising in the letting of Government contracts is as applicable to contracts for carrying the mail as it is to other Government contracts, and was as applicable to carrying the mail by means of pneumatic tubes in New York in 1950, as it was to other contracts for carrying mail anywhere, by any method. I find no suggestion anywhere that the reasonable exceptions to the general advertising requirement contained in section 5 would be less reasonable if used by the Post Office Department than they would be if used by the Department of the Interior.

As to the requirement of R. S. 3709 that, in order to contract without advertising because only one source of supply is available, "the contracting officer shall so certify," I think that requirement was satisfied because the Postmaster General himself signed the contract. If the contracting officer had been a lesser official, he would have had to certify to the Postmaster General, the chief of his department, the reason for the failure to advertise. The Postmaster General's certification to himself would have been another useless gesture, comparable to the formality of advertising for non-existent bidders.

It is apparent from what I have written that I think the plaintiff's contract was valid and was breached. I would visit upon the United States the normal consequences of breach of contract.

JONES, *Chief Judge*, took no part in the consideration and decision of this case.